No. 3322

United States Circuit Court of Appeals

For the Ninth Circuit.

OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. D. BRANHAM,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3322

United States

Circuit Court of Appeals

For the Ninth Circuit.

OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. D. BRANHAM,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

Names and Addresses of Attorneys of Record.

PLUMMER & LAVIN, 509 Mohawk Block, Spokane, Washington,

JOHN SALISBURY, 503 Rookery Building, Spokane, Washington,

Attorneys for Plaintiff and Defendant in Error,

and

A. C. SPENCER, Wells-Fargo Building, Portland, Oregon,

HAMBLEN & GILBERT, 804 Paulsen Building, Spokane, Washington,

Attorneys for Defendant and Plaintiff in Error. [2*]

In the Superior Court of the State of Washington, in and for the County of Whitman.

No. 2981.

A. D. BRANHAM,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation, and THE CITY OF PULLMAN, a Municipal Corporation,

Defendants.

Amended Complaint.

Comes now the above-named plaintiff by her attorney, John Salisbury, and amending her complaint,

*Page-number appearing at foot of page of original certified Transcript of Record.

and for cause of action against defendants above named, alleges as follows:

I.

That plaintiff is a single unmarried woman; that the Oregon-Washington Railroad and Navigation Company, defendant above named, is a corporation licensed to do business in the State of Washington; that the above-named City of Pullman, said defendant, is a municipal corporation organized and existing under and by virtue of the laws of the State of Washington, and located in the State of Washington.

II.

That there is located within the corporation limits and boundaries of the said City of Pullman, defendant above named, a certain street designated, named and known as Kamiaken Street, existing and laid out for the use of citizens and the general public of the City of Pullman; that there is on said above-described street a certain bridge beginning at a point south of the tracks or right of way of the first above-named defendant corporation, and running thence within the side-lines of said above-named street across a small stream to a point on said street that intersects the south line of the Northern Pacific right of way which runs east and west across the said street at said point of intersection. [3]

III.

That the said City of Pullman, through its council, on the 2d day of November, 1915, authorized the proper officials and representatives of said City of Pullman to enter into an agreement and contract by

and with the said above-named defendant railroad company, authorizing and agreeing that the said railroad company should proceed to at once place the said above-described bridge in a thorough and proper state of repair; that thereafter the said above defendant railroad company entered upon the performance of said contract for the repair of said bridge, and thereafter on or about the 11th day of May, 1916, the said above-named defendant railroad company presented and rendered to the said City of Pullman a bill for the *pro rata* share of the cost of placing said bridge in repair as per their agreement between the said corporations, which said bill was duly paid by said municipal corporation.

IV.

That during the course of the reconstruction and repair of said bridge by the said above-named defendant railroad company, the said railroad company, through its servants, placed across the north of said bridge at its junction with the south line of the said Northern Pacific right of way, a barricade of planks extending across the said Kamiaken Street at said point, to a point on the east line of said bridge and the sidewalk thereof; that after the said railroad company had partially completed said bridge aforesaid to a sufficient extent as to permit the crossing of said bridge by pedestrians on the sidewalk thereof, the said railroad company, through its servants, and to permit and enable the citizens and general public of the City of Pullman to cross said bridge upon the sidewalk of said bridge, at a point on the east side of the sidewalk running from

said bridge and at the junction of the north end of said bridge with the south line of the Northern Pacific Railroad Company's right of way where the same crosses the said [4] Kamiaken Street at the barricade erected by said company as aforesaid, and at which point the said sidewalk on said bridge was torn up and in an impassable and dangerous condition for pedestrians, the said railroad company, through its servants, negligently and carelessly laid a temporary sidewalk outside of the said barricade above mentioned and across and over the partially excavated portion of the street south of said barricade; the north end of said temporary sidewalk being on the said street east of the east end of said barricade; said planking being approximately 16 or 18 feet long by about 1 foot wide, with spaces in between and without any railing or side protection whatever to prevent or protect pedestrians from falling off of the sidewalk through and into the holes and partially excavated street over which the permanent sidewalk on said bridge was to have been laid, which said negligent, careless and crude condition of said sidewalk was suffered and permitted to be laid by said defendant railroad company by said above-named municipal corporation for a period of several weeks prior to the 4th day of February, 1916, which said defective and improperly laid sidewalk or portion thereof was used during said time and was the only means of passing over said portion of said sidewalk on said street for said period of time by the general public and citizens of the said City of Pullman, up to and including the said 4th day of February, 1916.

That on the said 4th day of February, 1916, the condition of said temporary and defectively laid sidewalk aforesaid was such that the said defendant railroad company and the said defendant City of Pullman had permitted to accumulate upon said planking laid as such temporary and defective sidewalk on said street, quantities of snow and ice, the same having been permitted to accumulate in a rough, uneven, slippery, dangerous and negligent condition upon said planking constituting said sidewalk as aforesaid.

V. [5]

That on the 4th day of February, 1916, after dark on the evening of said date, plaintiff herein while attempting to pass over said above defective and dangerous sidewalk described, carelessly and negligently constructed as aforesaid, and carelessly and negligently maintained and suffered to be maintained by the above-named defendant corporation as aforesaid, when at a point midway between the north end and the south end of said temporary and defectively and negligently constructed and maintained portion of said sidewalk above described, and because of the defectively and negligently constructed and negligently maintained condition of said sidewalk as aforesaid, the plaintiff slipped and fell on and from said sidewalk into one of the excavations still open on the side of said sidewalk and by her fall, because of the negligent construction and defective condition of said sidewalk, plantiff suffered a Pott's fracture of the left ankle joint, which is a fracture of the inner Malleolus with serious injury to the

lower tibial articulations with the rupture of the internal lateral ligament, and plaintiff also suffered a painful injury to her back by straining the muscles and ligaments of the back, also congestion and displacement of the pelvic organs, this causing chronic neurasthenia from which plaintiff suffers constantly; that because of said injuries plaintiff was confined to her home in bed for a period of more than eight weeks and had to have the services of physicians and a nurse, and said injury is a permanent and continuing injury and plaintiff never will fully recover from the effects of said injury, *and because of said injury,* and because of said injury suffered as aforesaid, plaintiff has incurred great pain and suffering, and plaintiff is at this time unable to use her said foot and ankle as effectively as prior to the said injury, and plaintiff is informed and believes that she will never be able to use her foot to the same extent as prior to the said injury.

VI. [6]

That plaintiff's occupation is that of a dressmaker and while working at such occupation it is absolutely necessary and essential, in order to properly conduct her said occupation, that she use the ordinary sewing-machine used in such occupation, and for the running of said sewing-machine it is absolutely necessary and essential that both feet be used in the operation thereof; that because of the injury aforesaid, incurred as aforesaid, plaintiff will be forever incapable of using her foot for such purpose; that prior to said accident and injury plaintiff worked continuously at her said occupation of dressmaker

and earned thereby an average of about $3 per day; that because of said accident and injury to her said limb described as aforesaid, plaintiff will be utterly unable to follow her said occupation as dressmaker, and because of the necessity of employing physicians and nurses, plaintiff has been required to pay large sums of money for such services.

VII.

That thereafter, to wit, within 30 days after the said injuries were received in the manner aforesaid, plaintiff duly filed her notice of claim for her damages because of said injuries received as aforesaid, with the clerk of said defendant municipal corporation.

VIII.

That because of the facts hereinbefore stated, and the injuries heretofore described and set forth, plaintiff has suffered and sustained damages in the total sum of $10,000.

WHEREFORE plaintiff prays judgment against the defendants above named, and each of them, for her damages received because of the negligence of defendants as set forth above, in the sum of $10,000, together with her costs and disbursements by her in this action incurred.

(Signed) JOHN SALISBURY,
Attorney for Plaintiff. [7]

State of Washington,
County of Spokane,—ss.

A. D. Branham, being first duly sworn on oath, deposes and says: That she has read the above and foregoing amended complaint and knows the con-

tents thereof and that the same are true as she verily believes.

(Signed) A. D. BRANHAM.

Subscribed and sworn to before me this 20th day of October, 1917.

(Signed) JOHN SALISBURY,
Notary Public for Washington, Residing at Spokane, Washington.

Service of the within Amended Complaint is hereby acknowledged this 24th day of October, 1917, by receipt of a copy of same.

D. C. DOW,
Attorney for City of Pullman.

Service of the within Amended Complaint is hereby acknowledged this 20th day of October, 1917, by receipt of a copy of same.

HAMBLEN & GILBERT,
Attorneys for O.–W. R. & N. Co.

[Endorsements]: Amended Complaint. Filed in the U. S. District Court for the Eastern District of Washington. May 4, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [8]

[Title of Court and Cause.]

Answer.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, and in answer to the amended complaint of the plaintiff, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph one of said amended complaint.

II.

Admits the allegations contained in paragraph two of said amended complaint.

III.

Admits the allegations contained in paragraph three of said amended complaint.

IV.

Denies each and every allegation, matter and thing alleged in paragraph four of said amended complaint, except that during the course of reconstruction and repair of the bridge referred to in said amended complaint, the defendant railroad company placed a barricade of planks extending across said Kamiaken Street.

V.

Alleges that it has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph five of said amended complaint, and therefore denies the same.

VI. [9]

Alleges that it has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph six of said amended complaint, and therefore denies the same.

VII.

Alleges that it has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph seven of said amended complaint and therefore denies the same.

VIII.

Denies that plaintiff has been damaged in the sum of $10,000 as alleged in paragraph eight of said amended complaint or that she has been damaged in any sum whatsoever by reason of the carelessness or negligence of the defendant or any of its employees.

FIRST AFFIRMATIVE DEFENSE:

For an affirmative defense herein, this defendant alleges:

I.

That on or about the 4th day of February, A. D. 1916, the defendant while engaged in the reconstruction and repair of a certain bridge along Kamiaken Street in the City of Pullman, Wash., properly barricaded the said street against traffic, both vehicle and pedestrian; that on or about said date and notwithstanding the said obstruction referred to, the plaintiff went upon the premises adjoining said bridge and not a part thereof, nor a part of said Kamiaken Street, and after going thereon slipped and fell; that defendant is informed that injuries resulted therefrom, the exact nature of which are unknown to this defendant; that in going upon said premises as aforesaid the said plaintiff was guilty of contributory negligence.

SECOND AFFIRMATIVE DEFENSE:

For a further affirmative defense, this defendant alleges:

I.

That on or about the 4th day of February, 1916, while the defendant was engaged in the reconstruction and repair of a certain [10] bridge over and

along said Kamiaken Street in the City of Pullman, Washington, a heavy snow fell and immediately thereafter the same melted and froze and made the premises in and about the said bridge exceedingly slippery and such condition was fully known to the plaintiff herein, and that while the said premises adjacent to the said bridge were in such condition and notwithstanding the obstruction placed to said bridge, and the premises adjacent thereto, and acting carelessly and negligently, the said plaintiff entered upon the said premises with high-heeled shoes which made any attempt to walk upon said premises exceedingly dangerous and perilous; and that this plaintiff negligently and carelessly after passing said obstruction attempted to walk upon said premises adjacent thereto covered with snow and ice, as aforesaid, with said high-heeled shoes and thereupon and by reason of said slippery condition and said high-heeled shoes worn by plaintiff, said plaintiff fell and sustained injuries, the exact nature and extent of which are unknown to this defendant, and in so doing plaintiff was guilty of contributory negligence.

WHEREFORE, this defendant prays that said action be dismissed and that it have judgment for its costs herein against the plaintiff.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

L. R. Hamblen, being first duly sworn, on oath de-

poses and says, that he is one of the attorneys for the above-named defendant, and makes this verification in its behalf for the reason that none of the officers of said defendant corporation are present within the County of Spokane and capable of making said verification; that he has read the foregoing Answer, knows the contents thereof, [11] and that the same are true as he verily believes.

(Signed) L. R. HAMBLEN.

Subscribed and sworn to before me this 5th day of September, 1918.

[Seal] (Signed) W. S. GILBERT,
Notary Public, Residing at Spokane, Spokane County, Washington.

Service of the within Answer is hereby acknowledged this 6th day of September, 1918.

JOHN SALISBURY,
Attorney for Plaintiff.

[Endorsements]: Answer. Filed September 6, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [12]

[Title of Court and Cause.]

Reply.

Comes now the above-named plaintiff and replying to defendants' first and second affirmative defense set forth in their answer alleges, to wit:

I.

Plaintiff denies each and every allegation set forth in defendants purported 1st affirmative defense as contained in their said answer.

II.

Plaintiff denies each and every allegation set forth in defendant's purported 2d affirmative defense as set forth in their said answer.

(Signed) JOHN SALISBURY,
Attorney for Plaintiff.

State of Washington,
County of Spokane,—ss.

A. D. Branham, being first duly sworn on oath, deposes and says that she has read the foregoing reply and that the allegations thereof are true.

(Signed) A. D. BRANHAM.

Subscribed and sworn to before me this 12th day of September, 1918.

[Seal] (Signed) JOHN SALISBURY,
Notary Public for Washington, Residing at Spokane, Washington. **[13]**

Service of the within Reply is hereby acknowledged by receipt of a copy of same this 14th day of September, 1918.

HAMBLEN & GILBERT,
Attorneys for Defendant.

[Endorsements]: Reply. Filed in the U. S. District Court for the Eastern District of Washington. September 21, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[14]**

[Title of Court and Cause.]

Verdict.

We, the jury in the above-entitled cause, find for

the plaintiff, and assess the amount of her recovery at three thousand seven hundred and fifty dollars ($3,750).

(Signed) J. D. CASEY,
Foreman.

[Endorsements]: Verdict. Filed September 24, 1918. W. H. Hare, Clerk. [15]

[Title of Court and Cause.]

Motion for Judgment Notwithstanding Verdict of the Jury.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, by its attorneys, and pursuant to stipulation entered into between counsel for the respective parties, with the consent of the Court, and prior to the giving of instructions to the jury by the Court, by which stipulation it was agreed that in event the Court deny the motion of the defendant for a directed verdict the defendant might renew questions raised by such motion and the Court finally pass upon them by motion for judgment notwithstanding the verdict, moves the Court for judgment in favor of the defendant in the above-entitled cause notwithstanding the verdict of the jury returned in said cause in favor of the plaintiff and against the defendant.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant.

Service of the within motion for judgment is hereby acknowledged this 26th day of September, 1918.

JOHN SALISBURY,
PLUMMER & LAVIN,
Attorneys for Plaintiff.

[Endorsements]: Motion for Judgment notwithstanding Verdict of the Jury. Filed in the U. S. District Court for the Eastern District of Washington, September 26, 1918. W. H. Hare, Clerk. By Harry J. Dunham, Deputy. **[16]**

[Title of Court and Cause.]

Motion for New Trial.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, by its attorneys, and in event the motion of the defendant for judgment notwithstanding the verdict is denied by the Court, moves the Court for a new trial herein for the reasons and upon the grounds, following:

1. Excessive damages appearing to have been given under influence of passion and prejudice.

2. Insufficiency of the evidence to justify the verdict of the jury and that it is against the law.

3. Error in law occurring at the trial and excepted to at the time by the defendant.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant.

Service of the within Motion for New Trial is hereby acknowledged this 26th day of September, 1918.

JOHN SALISBURY,
PLUMMER & LAVIN,
Attorneys for Plaintiff.

[Endorsements]: Motion for New Trial. Filed in the U. S. District Court for the Eastern District of Washington. September 26, 1918. W. H. Hare, Clerk. By Harry J. Dunham, Deputy. **[17]**

[Title of Court and Cause.]

Order Denying Motion for New Trial and Motion for Judgment Non Obstante Veredicto.

This cause coming on for hearing upon the defendant's motion for a new trial, and upon defendant's motion for judgment notwithstanding the verdict of the jury (the latter having been interposed according to stipulation entered into at the time of the submission of the said cause to the jury), and the Court being fully advised in the premises, and having considered said motions, and each of them, and the argument of counsel:

IT IS ORDERED that defendant's motion for a new trial, and the motion for judgment notwithstanding the verdict, be, and each of the same are hereby denied.

Done in open court this 18th day of November, 1918.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Denying Motions for New Trial and Judgment Notwithstanding Verdict. Filed in the U. S. District Court for the Eastern District of Washington. November 18, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [18]

[Title of Court and Cause.]

Judgment.

This cause having heretofore come on for trial before the Court and a jury, and the cause having been submitted to the jury by the Court, and thereafter said jury returned into court their verdict awarding the plaintiff the sum of thirty-seven hundred and fifty dollars ($3750).

Now, therefore, upon the verdict of said jury and the evidence and proceedings in said cause,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, A. D. Branham, do have and recover of and from the defendant, Oregon-Washington Railroad & Navigation Company, a corporation, the sum of thirty-seven hundred and fifty dollars ($3750), and costs to be hereafter taxed.

Done in open court this 25th day of September, A. D. 1918.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Judgment. Filed in the U. S. District Court for the Eastern District of Washington. September 25, 1918. W. H. Hare Clerk. [19]

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED, that heretofore, to wit, on the 21st day of September, 1918, one of the days of the September Term of the United States District Court for the Eastern District of Washington, Northern Division, before Hon. Frank H. Rudkin, Judge of said court, presiding, this cause came on for trial on the pleadings heretofore filed herein.

This was an action at law to recover damages for personal injuries sustained by the plaintiff, alleged to have occurred by said plaintiff falling upon some planks at Pullman, Washington, near a bridge being reconstructed by the defendant, upon the 4th day of February, 1916.

Plaintiff appeared in person and by Messrs. Plummer & Lavin and John Salisbury, her attorneys, and the defendants appeared by Messrs. Hamblen & Gilbert, their attorneys, and a jury being duly empaneled and sworn to try the case, the following proceedings were had and testimony taken.

An opening statement to the jury was made by Mr. Plummer for the plaintiff.

Thereupon the following proceedings were had:

Mr. PLUMMER.—If I understand the pleadings correctly, if your honor please, I think they admit that they were reconstructing this bridge; isn't that correct?

Mr. HAMBLEN.—We admit there was a contract there between [20] the company and the city.

As to the terms of the contract, they are not alleged in the complaint, and of course the terms are not admitted.

Mr. PLUMMER.—No, I do not say they are admitted, but you admit that the company was engaged in rebuilding this bridge under some sort of arrangement.

Mr. HAMBLEN.—Yes. And I explained to Mr. Plummer that if we could not get the original contract, we have a copy here and are willing that he use it now if he wishes to.

Testimony of Mr. Reed, for Plaintiff.

Thereupon Mr. REED, being called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

I reside at Pullman have resided there about twenty-eight years with the exception of a couple years that I was on the Sound. The last fifteen years regularly. Am postmaster there. I am familiar with the streets of Pullman, and the street that Mrs. Branham was walking on. She is my wife's sister in law. I was there at the time this bridge was being constructed on Kamiaken Street, one of the public thoroughfares of Pullman, I suppose travelled more than any other street. I think the traffic is greater across that bridge than any other street in town. The south end of the bridge is just a block from Main Street and there is a street runs into it at the end of that bridge; two streets run into this bridge, one runs across and stops there. In other words, the traffic of two

(Testimony of Mr. Reed.)

streets coming that way have got to cross this bridge. It is right in the business center of Pullman for travel. I recall Mrs. Branham getting injured there on that bridge or on the planking that approaches the bridge. I cannot remember as to dates, but it is probably two weeks or a little longer that the bridge had been in condition it was when she got hurt, I don't remember just exactly, it was some time, and we had quite a bad spell of weather at the time, snowing and thawing. They could not work. I did not see where she fell; I was not there [21] right after she got hurt. I know the condition of the street, is all. I did not see when she fell. I recognize those planks by your description; there was three planks and there wasn't any two of them the same length, as I remember it. They was laying on the left side as you go south; that would be the east side. There was one of them laying a little up on the edge of the other. Those were bridge planks or something. And the other one was laying a little west from that, an inch and a half or two inches or something like that. That is, it was not always that way, of course, as the planks got loose and thawed out like it kind of jumped around. It was on small rock or gravel or loose stuff as would be about a bridge in building that way. There was a crack between two planks. Those planks were supposed to be twelve inches wide, I think, what they call bridge plank. I don't know what else they could be put down for except to walk across, because we could not get

(Testimony of Mr. Reed.)

across without there being something there, the way they had it.

Q. What did these planks extend over, what kind of hole or excavation?

A. Irregular. I would like to explain that bridge was—

Q. I will get at that, Mr. Reed.

A. In tying it up it made an irregular place in there where those planks were put, you see. At that time the defendant company was carrying on the work of reconstructing the bridge. I made a plat which substantially shows the situation there of those planks and the approach of the bridge for you this morning in your office. This just about substantially shows the situation there with reference to the approach, the planks and the bridge and the O. R. & N. track and the Northern Pacific track. This may not be just exactly. I don't think these two come exactly together, but just the angle here. I don't know that that is just right. Just about substantially. The main bridge is on the south side of the [22] O. R. & N. track, which is marked O.-W. R. & N. track on this plat. This is the creek. The water runs along there. This is lowland, bottom land from the O. R. & N. track to the place marked "N. P." The two planks that I spoke of are shown on this plat on the northeast corner of the bridge. You may call that an approach, but we call it a bridge. This is what we call the south Palouse. These things marked "plank" here are the three planks testified to. This up here marked

(Testimony of Mr. Reed.)

with an "X" is a sidewalk, and there is a break between the property line here and the sidewalk, but that is a regular property line. "P. L." is the property line, and this is a restaurant marked "Res." Palouse Street comes in here right along the side of the N. P. right of way, marked "P. S." This sidewalk is down to the finished street there. I think that is brick, the way it was then, and a short sidewalk about from here, to connect that on the other side of the railroad track and it was torn up when this bridge was being made; that was torn up and left it there rough and bad, where you have marked the "R." During the three or four weeks while they were repairing that bridge we had to go down here and had to cross here, across the north end and go along here and over to town. That curved line is marked "O. X." The approach, the bridge, the sidewalk and planking and all that I have described here is within the limits of the street, between the property lines; a thirty-five foot bridge and eighty foot street. I passed over this place just before six o'clock going to the office on the same day of the accident. I usually stay at the office until eight. There is mail comes in there, and I had to go back home, and I didn't know anything about the accident until about eight o'clock.

The COURT.—Is there any controversy over the existence of this walk, or the purpose for which it was used?

Mr. HAMBLEN.—There is some difference as to how it was used on this occasion. There is no ques-

(Testimony of Mr. Reed.)

tion but what the walk [23] was completed there.

The COURT.—And that it was completed there for the purpose of accommodating the foot-passengers?

Mr. HAMBLEN.—Well, these boards, your Honor, I could not admit that, no. I think that will develop.

Being further examined by Mr. Plummer on behalf of the plaintiff, Mr. Reed testified:

Q. For three weeks previous were there any barriers on the sidewalk, on the south end of the approach across the end of the sidewalk, on the south end of the bridge, during all of the time that you speak of?

A. There was nothing there at any time that I know of that would hold them to go through, but the barrier was across the south end of the driveway, and the openings were left open for foot-passengers just the same as ever.

I would judge from three to five hundred people would pass this place that this lady was suing, and some of them as many as three and four times a day. It is between the city and the college, where everybody goes. At the time I crossed there about eight o'clock that night the ice and snow on there was in pretty bad shape, as far as that is concerned; the snow, and the people walking most always in the same place, it was naturally in kind of a ridge, the same as it would be on a step, or anything of that kind, that made it rough. It was probably two or three inches, or maybe more than that, where it was

(Testimony of Mr. Reed.)

irregular, where they would step more, and a person turned right around on that place, take hold of that railing that they had to walk around, turn there very short, and others would go a little further down, maybe four or five or six feet, some people maybe went down that far, but a great many would hold on that.

Q. How long had that condition existed there that you speak of with reference to the ice and snow? [24]

A. Well, it was bad weather all along for the full time. I think I passed there every day, and I did not see any attempt on the part of the company to clean off this ice and snow and make it passable so that there would not be any danger of people slipping. That railing that I spoke of is about sixty feet, I judge, from the O.–W. R. & N. It does not go clear up. It is about thirty feet from where this planking is to the end of the bridge. This plank is about twelve or fourteen or sixteen feet. Originally there was a railing clear up to the point there, when the bridge was first built, but not in the last five years, because this is all filled in now.

(Thereupon said plat made by the witness was marked Plaintiff's Exhibit 1 for identification.)

After Mrs. Branham was hurt she was taken to my house some time in the evening. I don't remember whether she was at the house when I got there or not, and she was there on account of her inability to get away between two and three months, I would judge, and during that time my wife took care of her; she

(Testimony of Mr. Reed.)

could not get about at all.

Thereupon Plaintiff's Exhibit No. 1 was admitted in evidence without objection.

Cross-examination.

Whereupon the witness was cross-examined by Mr. Hamblen and testified as follows:

Q. Now, will you just step down here again and look at this exhibit 1 and show the jury just where this obstruction or barrier that you referred to was placed with reference to the north end of the bridge here?

A. It was right at the edge, the railing across here that would keep people from there was right at the edge, at the end of the sidewalk, and extended clear to the east line of the sidewalk. There was no notice given there on that barrier to warn the people [25] not to cross there that I know of except at night there would be a red light in here, in the middle of the bridge. When they were working there, of course, they did not have it. That was when they quit work. During this period in February they were not working there on account of the conditions of the weather, I suppose. In order to get upon the sidewalk this sidewalk along the east side of the bridge was, I think, completed right up to the right of way or very close to the right of way of the Northern Pacific at this time in February. It was not completed until some time after the bridge was made, but at this time it was completed. The sidewalk was completed right up to the end of the bridge and the right of way of the Northern Pacific. It was com-

(Testimony of Mr. Reed.)

pleted, it was in the same condition that it is now in, the sidewalk, I think. I am quite sure there were three planks. They were put there when they stopped work. The night they stopped work or the evening they stopped work they were put there. I don't know when that was; it must have been in December; maybe not until in January. I do not know whether these planks were put there at the instance of the city or by the company. This place where the planks were placed was not a part of the bridge, but looked like part of the lumber that they were using there. They were what they call bridge plank, three by twelve, and they were not the same length, twelve to sixteen feet. There was just the one length along there, just the one length of plank. It came out to about the corner of the bridge on the sidewalk, and this ground was a little irregular. It had been in very nice shape, but after they took those boards away and the old bridge away, it fell down and caved in further than the sidewalk was built, and it left holes in there where those planks were put, I suppose so that they could cover up those holes so that people could get through. It would have been complete, I suppose, if they had been packed down or fixed so that they could not move, but you know how lumber will tumble about when people will walk [26] on them. These were not packed down. Of course they moved the way people travelled. When it was frozen hard, of course they probably would not move, but as soon as they would thaw, in people travelling there, many people, they

(Testimony of Mr. Reed.)

are bound to move around. I think it was frozen hard at this time, though. I would not be certain about it, and had been off and on for some time. You see the weather is not always frost here. I own this property here marked "Res." It was used for a restaurant at that time and had been for some time prior thereto, known as the Miller Restaurant, and I still own that. I don't know as I just know the date when this plank was put down, but it was put down when they quit the work that night. They were working there from time to time, and would leave it, just as anybody would leave work, and go back the next morning or the next day as soon as they could. I did not make any complaint to the company about the way those planks were put there. I supposed it was the city and left it with the marshal, and he was street commissioner also, and the mayor, and Mr. Duffy, one of the councilmen, and spoke to them about that being a very dangerous place, and should be looked after, and the marshal after the accident happened took an axe and cut that ice that gathers from time to time, cut it off, was the first work he had ever done to it. I told them that after the accident happened. The city did not do anything, but I saw Mr. Wagner did, he and his men would go and chop the ice the next day after the accident. Mr. Wagner was the marshal and also what I think they call the commissioner at the time of the accident. I had made complaint to him before that it was bad. I had not made any complaint to him as to the condition the planks were in, not particularly

(Testimony of Mr. Reed.)

the planks, any more than the condition the street was in by passing over it, because I had to pass over it several times in the day and night, and I was afraid of it, is all. The snow and ice had been permitted to accumulate on the walk along there, on the bridge as well as on this [27] planking. I don't know that it was shovelled off of that sidewalk at all. But it was open all of that time for the use of the public, and the public used it. That was the only way they could get there without going—I don't know it is several hundred feet across the other bridge away down, there is another crossing. Prior to that time I had not asked any representative of the city to open up that crossing so that people could pass there. The same condition existed here that did there, exactly.

Q. That is, it existed all the way on the sidewalk across the bridge?

A. Well, no, this place where the sidewalk had been taken up here, on the north side of the right of way. This bridge approach now runs, if you will measure it, a little up on the Northern Pacific right of way to-day. It is built out just a little on to the right of way, and it is not probably three or four feet—I am pretty well familiar with that land along there because I own a little property along up here in different places, and I had occasion to survey it at different times. I live up the street there a ways, the second block.

Q. And that slippery and icy condition that you

(Testimony of Mr. Reed.)

referred to existed some way north of the point in question?

A. No, this is about three or four feet, I am speaking about this railing across the end, probably two feet up on the Northern Pacific right of way. But the people travelled all the way from that point to five or six feet below that. You know how it would be, people would walk down further than others. You would see the school boys jumping down there in all sorts of ways. Even when the bridge had nothing but stringers across it, the people would come across there in some way.

Q. Then there wasn't any well defined path along this rail around by these planks?

A. Nothing only that. You see they had to cross the [28] railroad here. The railroad had planks in between, as they always have, and this place here, from Palouse Street, or rather from the railroad track to the bridge, was not broken up here like it is there, you understand. I mean by "here" between the walk or the trail that they would go. Don't you see how that is marked now. Well, now, this was not broken up like that, because there was no occasion for it. That was comparitively smooth and people could walk there. But here, where it interfered with it in building a bridge, or along here, as far as that was concerned, was torn up, along the north end of the bridge.

Q. Now, Mr. Reed, you have made a pretty circuitous route here. As a matter of fact, if that barrier came merely to the east line of that sidewalk it

(Testimony of Mr. Reed.)

was not necessary to go clear out the way you have indicated on this exhibit 1, was it?

Mr. PLUMMER.—He said it was substantially correct, but not exactly.

Mr. HAMBLEN.—Well, it makes quite a difference.

Q. As a matter of fact, this second line which you have drawn, and which I am now making blacker, and we will mark it "O. X. O." that is about the route that they would take coming down here, wouldn't they?

A. Yes, sir. In other words, just skirt the north barrier and come back on to the sidewalk. I never had Mrs. Branham point out to me the point where she fell. I heard her say that it was below this place here. From this north end of the bridge here along the sidewalk and along these planks it was practically all the same with reference to being covered with snow and ice. The snow would melt and there was no effort made to keep it clean, only occasionally that I know of, except I suppose it is the city's business to keep the sidewalks there looked after, and that is why I complained to the city. Mrs. Branham was taken to my house after the accident, and it must have been something after [29] eight, probably eight or eight thirty that I first saw her after the accident. I go home at eight o'clock. I think she had only been living at my house a few days at the time of the accident. She had come up from Oregon, from Portland, and her daugther was staying at our place, and I think Mrs. Branham was aiming to

(Testimony of Mr. Reed.)

go back in two or three days, and she probably was there ten days or two weeks. I think she had only been there for a few days at this time. I did not talk with her at that time about bringing a suit to recover damages for her injury. She just talked with different ones for some time before she made any complaint. I talked with her some time after the accident about bringing a suit, I could not tell; it was not immediately after, or anything like that.

Q. Did you go and see her attorney, Mr. Matthews, then and talk with him about it?

Mr. PLUMMER.—I think I shall object to that. I don't know anything about whether she had an attorney. He had a right to see an attorney if he wanted to.

Mr. HAMBLEN.—I wanted to show his interest.

The COURT.—It will show his interest in it, and so you may proceed.

A. Why, I don't remember whether I talked to him about it at that time, or not. I did talk with him about it, yes, sir. I went down there several times and made some measurements. I cannot remember now who I went with, but I don't know but what Mr. Matthews was with me one time. I made several—I went several times. I made one measurement just before I came up here this time, that is, stepped it.

Q. And who else did you go with besides Mr. Matthews at that time?

A. I don't remember—so many people.

Q. In regard to the barriers at the south end of

(Testimony of Mr. Reed.)

the [30] bridge, you say as a positive fact that the barrier did not extend across the sidewalk on the south end of the bridge?

A. No, sir, there wasn't anything across the sidewalk that I ever seen, but there was across the bridge, the main bridge. It was across the roadway of the bridge. It was across the sidewalk on the other side, the other side of the south end.

Q. Had the city removed it from across the sidewalk on the south end?

A. I don't remember of it being in there, because they travelled it all the time. It was just the same as any other sidewalk.

Redirect Examination.

Whereupon, upon redirect examination by Mr. Plummer, he further testified:

Q. Mr. Reed, you spoke about the company having stopped work just before this accident occurred. You used the words "stopped work." What do you mean by that? That they suspended temporarily or somebody had got through with the whole job?

A. They quit work.

The COURT.—Laid off on account of the inclemency of the weather, I understood.

Mr. PLUMMER.—That is what I understood. I wanted to know whether the jury understood that or not.

A. That is what I supposed, on account of the weather. And at that time the bridge had not been completed. These planks were laid down where the company had been working before that. I do not

(Testimony of Mr. Reed.)
know how long after that that the bridge was completed and taken over by the city. It was some time. The bridge was—

Mr. HAMBLEN.—I object to that. The record, I think, would be the best evidence of that.

Mr. PLUMMER.—It is not of sufficient importance to get all the city records up here. I did not suppose there would be [31] any dispute about it. It was afterwards, though, wasn't it?

The COURT.—It was some time after the accident?

Mr. PLUMMER.—It was after the accident that the city took it over?

A. Yes.

Mr. HAMBLEN.—If the Court please, that is somewhat leading.

The COURT.—Oh, is there any dispute over it?

Mr. HAMBLEN.—Yes, if your Honor please, we contend that the city at this time, if the public were permitted to use the sidewalk, it was done by permission of the city and not the company, and whether or not they took it over would not be material, in view of the facts in the case.

Mr. PLUMMER.—You had charge of it during that construction.

The COURT.—Well, counsel rather had reference to whether the work was completed, I presume.

Mr. PLUMMER.—Yes, that was all.

Testimony of Hollis Pinkley, for Plaintiff.

Thereupon HOLLIS PINKLEY was called as a witness in behalf of the plaintiff, and being first duly sworn and examined by Mr. Plummer, testified as follows:

I reside at Pullman, and resided there at the time this lady got hurt; helped pick her up; was crossing at the time, going north. I was going from town and was using this same path or foot bridge that she was using. To the best of my recollection there was two planks laid parallel with the bridge, and the snow had become packed on top of these planks and rounding off a little bit. There was some space between the planks, not very much. I did not see her fall. I was walking right behind Mr. Price at the time, and I saw her on the ground and helped to pick her up. She appeared to [32] be in pain. I heard the description given by Mr. Reed as to the condition of this plank. As far as the technical part of his description is concerned I would not say. I walked over that, but there is a lot of things I could not say. As far as I can recollect now that would be it generally. I would hate to say how long that had been used by pedestrians, it is about three years ago, but it was several days I know. I think it was in substantially the same condition when this accident occurred as it had been for two or three days anyway. I would not go further than that, because it was snowing.

(Testimony of Hollis Pinkley.)

Cross-examination.

Whereupon the witness was cross-examined by Mr. Hamblen and further testified:

My best recollection is that there were only two boards there. I have travelled it from four to six times a day, lived up in the north part of town on College Hill. There was a barrier across the right of way at the north end of the bridge, and the top rail of that barrier—I believe there was one rail, if I remember right, extended from the sidewalk.

Q. And how did pedestrians get up on the sidewalk on the bridge past that barrier?

A. Well, I know how I did. I swung around the barrier on the end.

Q. Just step down here to the front of the jury and show—

Mr. PLUMMER.—There is no dispute about that, Mr. Hamblen. They all walked around the barrier.

A. I saw this exhibit 1 before up in Mr. Plummer's office, possibly the barrier extended to the east line of the sidewalk here, I would not say. I would say that it did not go clear to the line. I would say that it stopped within about a foot of the line. Now that is my opinion. It stopped within a foot of the east line at this point marked "Y," about there. In coming down from the north [33] going southerly along there and swinging around this barrier I do not believe it was necessary to get off of the sidewalk at all before reaching these planks. You would swing on to those boards. I would not say whether those boards were right up to the end of

(Testimony of Hollis Pinkley.)

the bridge or down here. That has been some little time ago, and I have really forgotten all about it. You see in here on the right of way there was two walks in there side by side, if I remember right, and they have changed the right of way a little bit; that is, on the right of way, and the railing would be on the walk if it was swung out here before you approach the barrier.

Q. But in swinging around that barrier there you would have to go up on these planks to get on the sidewalk on the bridge?

A. Well, I know you had to get on the planks. Yes, I have walked on them. I would not say as to where those began and where they left off.

I helped pick up Mrs. Branham, if I remember right, within two or three feet of the barrier, south of the barrier, and I was just to the track when I saw her. She was down at that time. The sidewalk proper at that time, outside of the planks, had snow packed on it, the walk did. It had been snowing, and there was hard snow on there. There was a well-defined trail through there, a path there, because there was a good many people travelling there. That trail ran across these boards. I had to walk on those boards, I know. I picked her up there within two or three feet of the barrier; she was south of the barrier.

Mr. HAMBLEN.—She says in her statement that it was about thirty feet.

Mr. PLUMMER.—We object to comparisons.

The COURT.—I will sustain the objection.

(Testimony of Hollis Pinkley.)

A. Those boards were rather heavy boards and they were practically as close together as you would lay a couple of boards. I don't think there was room for a foot to go between. [34]

Q. Was the snow any more uneven on these planks than it was on the sidewalk there?

A. Well, the boards ran parallel with the walk, and it was rounded up on the board possibly more than on the walk. I would not say how long it had been in that condition.

I would say that the snow and ice had been in that condition three or four days. At the time I picked her up it was betweeen five-thirty and six o'clock, and I would not say it was dark. I could see.

Q. And you could see plainly?

A. I could see, yes. I did not see her until after I had crossed the track. I was behind Mr. Price. I just stepped around. I don't know whether I stepped behind Mr. Price or what. There was nothing said by Mrs. Branham when she fell there that I recollect of.

Q. You helped her up and she walked off unassisted?

A. No, I offered to assist her, and she limped across the bridge. I never made any measurement there with Mr. Reed. I made some with Mr. Matthews, who was the attorney for Mrs. Branham, I presume, but I have forgotten that. I cannot indicate where she fell.

Q. When you picked Mrs. Branham up, when you

(Testimony of Hollis Pinkley.)

assisted in picking her up, was there any indication that her foot had gone through any hole, or anything of that kind?

Mr. PLUMMER.—I don't think the form of the question is proper, was there any indication. He may ask here whether she saw any indications.

The COURT.—You may state whether there was a hole there, or anything of the kind, if he observed any.

A. No, I did not observe any.

Q. Will you say, Mr. Pinkley—can you say whether or not there was any hole big enough for her foot to slip through?

Mr. PLUMMER.—We object to that. He went and picked her [35] up, and I do not think he can say, unless he made a thorough inspection of it.

The COURT.—I think he has answered the question once or twice. He may answer it again, however.

A. No, not to my knowledge there was not a hole big enough to get her foot in. She walked off unassisted after I picked her up. She held the railing.

Redirect Examination.

Thereupon, upon redirect examination by Mr. Plummer he further testified:

When I saw that she had fallen I thought she was hurt and went to pick her up.

Q. And did not make any inspection or any critical inspection of the hole between the planks, did you; there might have been a hole that she went through or anything of the kind?

(Testimony of Hollis Pinkley.)

A. No, my knowledge, when I made that answer was in walking across the bridge. I had in mind to help her, and never thought of a damage suit.

Testimony of Mrs. A. D. Branham, in Her Own Behalf.

Thereupon Mrs. A. D. BRANHAM, the plaintiff, was called as a witness in her own behalf, and being first duly sworn and examined by Mr. Plummer, testified as follows:

I am the plaintiff in this case and have been living in Portland. I received an accident on the 4th of February, 1916. Was engaged in the business of dressmaking at that time and have been engaged in that business for over five years. My husband and I were divorced some years ago and this is my daughter here. I had not been living in Pullman before I got hurt for almost two years. Before that I had lived there for several years. Mr. Reed is my brother-in-law. I have been away just a few days before this accident occurred, to Portland, and when I came back to Pullman I [36] stayed at Mr. Reed's. This time that I was injured, it had been four or five days before that since I had been down town, or since the snow, across this plank or along this street. I had not been down there at all during the time that the reconstruction of this bridge was going on before the time that I got hurt, that I remember of. When I was there, though, two years before, and living there during those years, I walked across the old bridge and this street quite

(Testimony of Mrs. A. D. Branham.)

frequently. It was just a few minutes of six, and I wanted to do some shopping before the stores closed, so I started down town, and I passed this obstruction of planks that was laid across the bridge. And there was just a narrow path to walk in, I was following the path as near as I could; it was dark; and after I had swung around the end of the boards and walked four or five steps my foot seemed to slip into a hole of some kind, or crack. I had the impression that my foot was going through the bridge, and I fell, and broke my ankle and also hurt my back. Broke the bones of my foot, too, the left ankle. In walking on the plank, when I felt my foot go out from under me or slip, or whatever it was my body went over to the left and my foot felt as if it was in a hole in the crack. When I fell I pulled my foot out. When I started to walk across there there was nothing to indicate at that time that there was any crack between the boards or any hole to fall into. There was snow, lumps of snow on this planking to obscure any crack that might be in the board. The path seemed to be lumpy. When my foot slipped on this lumpy ice and packed snow, that is when I went down there.

Q. And pushed the snow down with you with your foot? A. Yes.

Mr. HAMBLEN.—I object to counsel leading the witness.

The COURT.—Sustain the objection, it is leading.

The WITNESS.—Assuming that this is a barrier across the north end of the bridge and this is where

(Testimony of Mrs. A. D. Branham.)
the people and I went [37] around, and these are the planking here, I presume I had taken three or four steps on to this planking when I fell. Before I fell, or nearly before I fell, I could tell how rough or uneven the snow and ice was. The path seemed to be lumpy and slick, but after I had passed the boards and swung around the boards I thought I was past the dangerous place, but I could not see that before I got to it. After I was picked up and assisted to my feet, I started toward town and walked down on the bridge a few steps on the bridge, but I was sick, sick in my stomach, had to rest several times. I finally met my daughter and she helped me back to the store. I recall Mr. Pinkley assisting me for a few steps. I insisted on them going on. I felt kind of sick on my stomach, and I didn't know that I was hurt as bad as I was. My limb felt numb when I started to walk, and I didn't know that my foot was broken. I went to the store and then called for a taxi. I was laid up at the residence of my brother-in-law, Mr. Reed, about three months, and during that time suffered a great deal of pain from that ankle, very bad pain. I did not sleep very much, with my ankle and my back. It was impossible to lie in bed very long or stay up either, so I was up and down and did not get very much rest. My back pained me; it felt like a strain; it pains yet at times, and this happened in 1916. At the time that I fell that is when I received this pain in the back that I speak of. I never was bothered with it before. I seemed to be

(Testimony of Mrs. A. D. Branham.)

hurt all over when I fell. Dr. Pattee treated my ankle during the time that I was laid up these several months, Dr. Pattee of Pullman. He called on me quite frequently and administered a treatment and Dr. Kinzey assisted him some. That is the only way I have of making a living, from my dressmaking. I am not able to carry on that business since the accident on account of my back and my ankle. If I run the machine three or four days, then I am laid up for a day or two. I have never felt real well since. I was perfectly healthy before this time. [38] Mr. Matthews, the attorney in Pullman, called at Mr. Reed's house just two or three days or three or four days after I was hurt, with a friend of Mr. Reed's, a Mr. Buzby. They came in to make a friendly call, and while he was there he told me that he had spoken to his wife a few days before, I think, about the dangerous condition of the walk.

Mr. HAMBLEN.—If the Court please, I think we are getting quite a ways from the issues.

The COURT.—Sustain the objection.

The WITNESS.—Mr. Matthews was afterwards appointed city attorney, after he talked with me. When this suit was first brought it was brought against the city and the company, and afterwards the city was dismissed.

Cross-examination.

Thereupon the witness was cross-examined by Mr. Hamblen and further testified:

I had not been to Pullman for several months

(Testimony of Mrs. A. D. Branham.)

prior to the time I was there just before this accident; I had been in Seattle and Portland; Portland most of the time, and most of that time was doing dressmaking in Portland; and prior to that time I had been living in Pullman; it had been quite a while before that time that I lived there, four or five years before that time. I don't think I have lived in Pullman, that is made it my home, since about 1909 or 1910, but I was there for several years prior to that time. Prior to this accident I was employed as a dressmaker, and that was the only source of my income. I left Portland on the 29th of January, and the accident happened on the 4th of February. I guess it must have been the O. R. & N. train that I came in on, and I went up to Mr. Reed's house from the train. I think I went up in a taxi, if I remember right. Mr. Reed lives several blocks from the O.-W. station, I don't know just how far it was. I cannot remember that I had been over this bridge between the time I arrived **[39]** there and the time this accident happened. I don't think I was, not over that part of the bridge. I don't think I was, I cannot remember it. If I had gone to town, that is, if I did not ride in a taxi, I would have passed over this bridge. I am quite sure I had not been down town before this.

Q. Had you discussed the condition of the bridge at all with anyone?

A. Why, I had heard Mr. Reed—

Mr. PLUMMER.—You mean before the accident?

Mr. HAMBLEN.—Before the accident.

(Testimony of Mrs. A. D. Branham.)

A. I had heard Mr. Reed remark about the condition of the walks.

Q. As to being dangerous and slippery?

A. No, I did not hear him say anything about that. I don't just remember what he did say, something about the snow being piled up. I heard a conversation between him and my daughter, I don't remember just what it was, but I do remember that he spoke of it as being in bad order, but I don't remember whether it was before I was hurt or after. It might have been after I was hurt, and it might have been before, I don't know; I don't remember.

I did observe that the condition there was lumpy, slippery and snowy as I was approaching the bridge. I remember having to catch hold of those planks as I went past them. It was not so very cold then. The ground was not so very much frozen, I don't think. It was slick. It was slippery and icy on the walk and on the boards, and I could feel the condition as I walked. I could not see, because it was dark. It was dark, I could not see. I could not see the condition of the snow and ice there. I could not exactly see the condition, no; I knew by walking that it was slippery. No, I did not have to feel my way along. I knew it was slippery and lumpy there, but I could not see it, and I never had been over it before. I did not have these same shoes on that night [40] that I am wearing now; did not have shoes very much like these. I don't know where the shoes are that I had that night, they were worn out and I suppose

(Testimony of Mrs. A. D. Branham.)
they were burned up. I suppose they have been burned up, I don't know. I left them with my sister-in-law; they may be there, I don't know. I haven't them here in court. Mr. Matthews made a claim to the city of Pullman and I signed the claim. This is my signature to the claim, marked Defendant's Exhibit 2 for identification, and I swore to it and that is my signature to the verification, and this claim was made by me as the basis of the injuries that I am now claiming, related to the same injury. This related to the same injuries that I am now suing this company for. I guess it was signed on this same date that is given here, on the 3d day of March, 1916, the date I swore to it.

Q. And I want to ask you, Mrs. Branham, whether or not you did not claim in this paper filed, that this accident was due to the slippery condition of the walk and not to any hole or anything of that kind in connection with the boards?

Mr. PLUMMER.—We object.

The COURT.—The claim speaks for itself. Sustain the objection.

Mr. HAMBLEN.—Q. I will ask you, Mrs. Branham, whether as a matter of fact, the cause of this accident was not the slippery condition of the walk, in your—

A. No. It was because my foot slipped into a hole, or something of that sort, or crack, I could not just exactly describe it. I presume it must have been a hole in the boards, because I was walking on the boards, or where the boards should have been.

(Testimony of Mrs. A. D. Branham.)

I did not examine it to see. I did not make a thorough examination, but I know my foot slipped in a hole. I never examined it afterwards. Yes, I can say at this time there was actually a hole there in those boards; there was a hole that my foot slipped into of some **[41]** kind. It might have been due to the ridging up of the snow and ice on the planks; it might have been a couple of ridges. I have not done very much dressmaking since I was hurt; I have done some. I have done some recently; I do a little, what I can; I do it in my rooms. I am now living in Spokane, and have been living here about two months—no, about six weeks, I think. I am living in the Allen Apartments and do general sewing, and have been doing it during those two months, and did what I could some time prior to that. I haven't a sewing-machine at those apartments now; I expect to have; I have only been there about a week. Since this accident happened I have not attended dances; I have gone to look on occasionally. I might have danced for a little, just maybe—I used to be fond of dancing, but I am not in the habit. I may have danced since this accident happened a few times, once or twice, but I have not made a practice of going to dances to dance. I have not really danced, I walked around to music, if that is what you call dancing. What I call dancing is simply walking to the music now, that is all you do now. I have walked to music at places where others were dancing, not very much, about three times since I was hurt, in Pullman; no

(Testimony of Mrs. A. D. Branham.)

place else. I did not go to the three different dances in Pullman since I was hurt to dance, I just dropped in to call. Yes, I was there, danced once at a lodge dance and walked around once or twice. No, sir, not more than once or twice; no place else only Pullman. I remember the occasion of a celebration on the 5th of July, 1917, at Pullman, and remember the dance at the rink there, and remember being present there that night. I tried to dance there that night but the place was crowded. I think I went around the hall once. I do not remember dancing with Mr. Rodeen, and do not remember dancing with Mr. Wright. I only danced around the hall once, I think. I don't remember who that was with; it might have been Mr. Wright, I am not sure about it.

Redirect Examination. [42]

Whereupon, upon redirect examination by Mr. Plummer, she further testified:

This fellow Wright that he speaks of might have been a spotter for the O. R. & N.; he asked me to dance. If I recall he is the operator at the Albion depot. The present system of dancing is just walking, just simply walking. I can dance to a waltz to slow music, too. I do not pretend now that I cannot walk. I could not tell how far my foot went down through this plank; it only—it went far enough so that it gave a twist. I felt the sides of my ankle against something when I twisted it and dropped over.

Q. At the time you filed a claim with the city,

(Testimony of Mrs. A. D. Branham.)

which you claim was on account of the same injuries which you are now suing the O.-W. R. & N. for, state whether or not at that time you knew who was legally liable for this condition?

A. No, sir, I did not.

Mr. HAMBLEN.—I object to that.

The COURT.—No inference can be drawn on that account. It is utterly immaterial. They might both be responsible as far as that is concerned.

Mr. PLUMMER.—Q. What was your age, Mrs. Branham, at the time of this accident?

A. Forty-one.

Testimony of Wilma Branham, for Plaintiff.

Thereupon WILMA BRANHAM was called as a witness in behalf of the plaintiff, being first duly sworn, was examined by Mr. Plummer, and testified as follows:

I am the daughter of Mrs. Branham, the plaintiff here. Was with her while she was at Pullman after she was hurt all the time. She suffered from this accident about as much as anyone could suffer apparently; she groaned. She would moan at night and was not able to sleep. She was not apparently able to do much by way of [43] labor for several months.

Cross-examination.

Whereupon the witness was cross-examined by Mr. Hamblen, and further testified:

During that period I was in Pullman working in a store, the Bon Ton, and my mother and I stayed

(Testimony of Wilma Branham.)

at Mr. Reed's. I don't know how long my mother was there, several months. I was there all the time she was there. I went to school here a year ago last winter, I went to school here, and my mother was here at that time; we stayed at the Ridpath, she and I, stayed there about seven or eight months, I believe. I came up, I think, in the month of November. She was here about two months before I was, and we were here all winter, up until summer.

Testimony of Mrs. A. D. Branham, in Her Own Behalf (Recalled).

Mrs. A. D. BRANHAM, recalled as a witness in her own behalf, testified on direct examination by Mr. Plummer as follows:

I consulted physicians in the city here with reference to the condition of my back, consulted Dr. Hanson first and he recommended electric treatments and I went to Dr. C. Hale Kimble and he treated me about five or six months. I have not been able to wear a shoe, a high-topped shoe since my ankle was hurt. I had one pair that Dr. Eikenbary, a foot specialist here, picked out for me at the Walkover Shoe Store and only wore them but a short time, and I put an a high shoe and laced it up over my foot and ankle, which causes a pain, and I had to change my shoes three or four times a day, and I find by wearing a small slipper it is more comfortable. I get this pain in my ankle where it was broken any time that I walk too much and when

(Testimony of Mrs. A. D. Branham.)

I run the machine. I can walk some, though, without causing me any pain.

Cross-examination.

Thereupon, on cross-examination by Mr. Hamblen, she further testified: [44]

I don't remember the exact date when I first made any claim against the O.-W. R. & N. Company for this injury; it was some time in October, 1916, and at that time I lived at the Ridpath. I do not remember at that time that Mr. McDonald at the claim department of the company called on me at the Ridpath. There was a party called on me, but I don't remember his name. The gentleman you indicate there resembles the man who called on me, and I think he did talk with me about the injury. At that time he prepared a statement in writing and I read it and signed it. This might be my signature on the papers marked Defendant's Exhibit 3 for identification that you hand me. I don't know whether that is the paper I signed or not. I could not swear that that is my signature. I signed a short statement. I won't say that this looks like it. I won't say that it is or I won't say that it is not my signature. It looks like my signature, all except that "A," that "Alice" does not look quite right. The rest of it looks like it—like my signature. I remember signing a short statement, but I don't remember whether there were two pages of it.

Q. Will you read it over and say whether or not that is the statement that you signed at that time?

(Testimony of Mrs. A. D. Branham.)

A. I don't believe I ever signed a statement like that.

Q. You have looked it over carefully and read it all through?

Mr. PLUMMER.—She has answered the question. There is no use arguing with her.

Mr. HAMBLEN.—I am not arguing with her, but I am going to show that this was the paper that she signed.

Mr. PLUMMER.—You may show it. I object to counsel saying that he is going to show it as an attempt to intimidate the witness. He may get his claim agent to swear to it, but that would not be showing it.

A. It seems to me that he asked me questions and was **[45]** writing at the same time. And here he says the boards were six or eight inches apart. I did not make any statement like that. He asked me questions and wrote them down at the same time.

The COURT.—The only question is whether you signed the statement. State whether or not you did, if you know?

A. I don't think I ever signed a two page statement. I don't think I signed this statement. I was not given a copy of the paper that I signed.

Mr. PLUMMER.—I will offer in evidence the deposition of Dr. E. T. Pattee, taken under stipulation.

Deposition of Eliphalet T. Pattee, for Plaintiff.

I am a physician and surgeon practicing at Pullman, Washington, and have been practicing there on or about or just prior to February 4th, 1916, and since that time. I have a State license to practice medicine, took my examination here and I am still practicing here. The accident happened February 4th, 1916, on the evening of February 4th, and I was called by Mrs. Branham—she didn't think it was a fracture at first, at the time she thought it was a mere sprain or strain and I was called on February 5th, the next morning, and I went immediately and found that it was a fracture, with crepitus, and I made an examination there and also called in Dr. Kenzie, L. G. Kenzie, in consultation. At that time floriscopically it shows a fracture, a Potts fracture as we call it, to the internal malleous of the left ankle joint. The fracture was reduced and was put in a plaster paris cast. A Potts fracture is a fracture of the internal malleous, or of the astragulus, or it may be of both bones, the tibia and the fibula. In this instance it was the internal malleous, the tibia and fibula form the archway something like that (indicating), and the astragulus malleous pushes in there (indicating). The astragulus is one of the bones of the ankle joint (indicating on exhibit "A"). And then when she slipped she must have put her foot that way (indicating). It was [46] broken to the left, out that way, so she must have swung her foot that way (indicating). This diagram would show it (indicating exhibit "A"). This shows that.

(Deposition of Eliphalet T. Pattee.)

This is the diagram I just made. This is the fibula and the pieces of the fibula and the tibia, that is just a narrow bone, and this forms the archway like that, and then the astragulus comes up in there (indicating). That shows the fracture of that bone there (indicating). I can make a little diagram of that showing the break, but I am not much at drawing. This forms the internal malleous and this forms the external malleous (indicating on exhibit "A"). (Witness draws a line on Exhibit "A" showing the break.) The astragulus acted as a wedge. There were two broken.

Q. From what direction, left or right, would the patient have fallen to have caused that fracture if it was caused by a fall?

Mr. GILBERT.—I object to it as incompetent, irrelevant and immaterial and not a proper matter for opinion evidence.

The COURT.—He may answer.

A. The astragulus acts as a wedge. As I understand, she caught her heel and at the same time slipped upon the ice. These things can all be worked out mechanically, she gets the power, the *eight* or pressure with her fall, in that way the weight of the body, which acted as the power, and the astragulus was the fulcrum and it was rammed up into the joint which caused the fracture, which causes a Potts fracture.

Q. Then from your observation of the nature of the break or the fracture the foot would have been held, it must have been held or caught?

(Deposition of Eliphalet T. Pattee.)

Mr. GILBERT.—I object to it on the ground it is incompetent, irrelevant and immaterial and not a proper matter for opinion evidence.

The COURT.—The question is very leading, but he may answer. [47] A. Yes, sir.

Q. And the weight of the body going over on the limb caused the fracture?

Mr. GILBERT.—The same objection.

The COURT.—He may answer.

A. Yes, sir.

Q. Now, just kindly state carefully and state clearly, doctor, in your own way, from your observation of the injury and the fracture, how the break or the fractures were brought about?

Mr. GILBERT.—I object to it as incompetent, irrelevant and immaterial and not a proper subject of opinion testimony from this witness.

The COURT.—The answer may go in.

A. In answering that I would say that it was due —to receive a Potts fracture there has to be an overriding or an overstepping, a lateral over-pressure of the ankle joint, which is caused either by a misstep, slipping upon a slippery pavement of any kind, or ice, or something in that way; many times in going downstairs. I have had three cases this summer—any misstep on a downward step, a misstep or slipping on a slippery pavement or anything in that way would cause those injuries. If the limb or the foot should be held by some means and the patient fell, it can be done in that way. It can be just simply by slipping—I slipped on a banana peel and my foot

(Deposition of Eliphalet T. Pattee.)

went in that way (indicating) but I just happened to catch myself. If it goes too far that way (indicating) you will lose your equilibrium and you will fall and the astragulus pushes up, and the power breaks off those two bones (indicating). I was in *attendant* upon Mrs. Branham from February 5th, 1916, until April 3d, 1916. If this patient's business or occupation had been that of a dressmaker, where she had to use that foot constantly on a sewing machine or something of that kind, that would impair her capacity, it would incapacitate her in gaining a livelihood because you cannot immobilize any joint without getting [48] some irritation upon use and also some stiffness, to immobilize any joint will cause stiffness, or an ankylosis. As I told her at the time, she would have trouble with it for a couple of years possibly, before that straightened, totally straightened out, as many times it will run over a period of two or three or five years and they will have a weak joint there and have to watch it. In a woman of her age and the occupation that she follows it would inhibit her from that source of livelihood for, I think conservatively, I could say for two or three years, as she follows the work of millinery and dressmaking. At that time she complained of her back terribly. In the wrench which she gave herself naturally she wrenched her back and the muscles of her back. That was evident. I never made any diagnosis of that injury. She stated she was very sore and was in that condition for some time. I reside in Pullman. I have ob-

(Deposition of Eliphalet T. Pattee.)

served the location of this accident prior to the actual happening of this accident. I, as the city physician there, called the attention of the street commissioner to that sidewalk, and my wife was coming down there just that same afternoon—

Mr. HAMBLEN.—I object to that.

Mr. PLUMMER.—There is no objection here.

Mr. HAMBLEN.— I don't know under what stipulation that deposition was taken, and I don't know whether objections had to be made at that time.

The COURT.—There is nothing in the stipulation with regard to objections, so you will proceed with the reading of the deposition.

Mr. HAMBLEN.—Your Honor holds that they cannot be made at this time?

The COURT.—Not unless it was reserved by stipulation.

Mr. HAMBLEN.—There is the further objection which could be made there and that is that the answer is not responsive to the question. [49]

The COURT.—Proceed.

The WITNESS.—My wife was coming down there just that same afternoon just before this accident happened and she slipped and fell there and I know well, during that period of a week, there must have been anyway half a dozen people fell on that place.

Q. Doctor, just state in your own language what was the condition of that walk from your own observation at that time?

A. The city, I understand, had contracted with the

(Deposition of Eliphalet T. Pattee.)

railroad company to put in a new bridge—

Mr. GILBERT.—I object to any statement of this witness as to what the city had contracted about with the railroad company as not the best evidence and hearsay.

The COURT.—Objection sustained.

A. The sidewalk lies to the—well, on this bridge it lies on either side, you see, and they had removed the planks. (Witness draws plat which is marked exhibit "B" and attached to this deposition). This is right at Miller's Cafe. This is the roadway (indicating on exhibit "B") and this is the sidewalk and then right here these planks had been removed and we had to walk around this way (indicating) and the planking was laid and this is a raise there, I would judge of ten inches, a guard you might say of ten inches, and the plank was right across that way and you had to go around; and I understand that everything was covered with ice there that cold spell, and I understand the accident happened on that bridge (indicating). That improvised sidewalk consisted of just simply a plank. I am not a lumber man, but I would say I think I walked over it several times myself, and I would say a plank possibly twelve inches wide. I couldn't say how many of those planks were there. They were laid endways. There was only one plank when I walked over it and a person would have to walk on that plank. There is no ground there over which that improvised sidewalk went, the planks were torn up and that just simply crosses [50] the Palouse River there. There is

(Deposition of Eliphalet T. Pattee.)

the bridge (indicating) and they had to go down this way, and then they walked up on to the incline on a very steep part of the sidewalk, which was very icy and slippery. There was ground under that improvised sidewalk or close to it, as I have just said, from here to here (indicating), up here, the walk crossed the track and went on up the hill. That is after they got across the improvised sidewalk. Under the improvised sidewalk there was, I believe—the track comes here and comes to the right of way and I believe that that is largely on the cinder bed, that the bridge is right upon the cinder bed there, and there is some sort of an excavation. That ground was undergoing a change at that time, that was the cause of the tearing up of the sidewalk and since then a proper sidewalk has been placed there, and the hole filled up, and it was during the changing that this accident happened.

Q. Did you observe whether they placed any special lights in the way of lanterns or anything there?

A. Lanterns?

Q. Yes, sir.

Mr. GILBERT.—When?

A. At the time this accident occurred at that particular place?

Mr. GILBERT.—You mean that particular night?

Mr. SALISBURY.—Yes, sir.

A. I did not observe that because I understand this happened about six o'clock in the evening, just as the people were going home, to their homes;

(Deposition of Eliphalet T. Pattee.)

I could not state that. I did not observe that. The rearranging and the construction work at that particular place was started before the cold weather started in, but because of the cold weather they could not continue or could not finish the work so it laid in that state for a period of several weeks, for some length of time, I could not tell just exactly how [51] long in weeks.

Cross-examination.

On cross-examination by Mr. Gilbert, the witness further testified:

At the time of this accident I had been engaged in the general practice of medicine and surgery and was not limiting my practice to any specialty. Mrs. Branham had not been a patient of mine before I was called. I had charge of the case. When I went to the house she was lying upon a couch and had hot towels wrapped around her ankle. I undid the wrappings and examined it with palpation, and that is I felt of the ankle, and you could determine very readily from the formation, the ankle was not symmetrical, and by the crepitation, and great pain and inversion, so I removed her then immediately to my car and took her to my office and turned on the electricity on it and took an X-ray I should say; took X-ray photographs of it before I reduced the fracture. Unfortunately those plates are broken. I moved my office from the building into the new building that was under construction, and during the moving the girl was careless and they were broken; they are all broken. After the fracture I did not

(Deposition of Eliphalet T. Pattee.)

take any, only to look through the floriscope to see it. I was able to reduce it so as to get the bones in good position. A Potts fracture is an accident of very common occurrence. I would not call it a simple fracture. I will say this, in answering that question, a fracture of any joint, of any bones which form a joint, more or less cause complications of that joint. There was some stiffness in this case and she had trouble with swelling of the joint for months afterwards. There is nothing more complicated or mysterious about a Potts fracture than the things suggested, nothing that an ordinary good physician can reduce and get good results, and I got a good result. I got a good result in reducing her fracture. Her ankle was put in a plaster cast from February, I would say six weeks, for the plaster [52] paris cast, and then I used a splint. That kind of treatment in itself, irrespective of any complication of the joint, to double it up that way, immobilized, would make a person's ankle stiff for some time. The proper treatment for getting rid of that stiffness is massage and use of the ankle, I would say now that she is using her ankle. And she can walk. I noticed her going down the street the other day and I took particular pains to watch her and she was limping slightly. I took particular pains to see that she did not know I was looking, as I wanted to see her. Massage and use of the ankle would be the proper treatment for removing that stiffness. I never ran a sewing-machine so I don't know whether there would be any real objection to a woman like this plaintiff

(Deposition of Eliphalet T. Pattee.)

using both feet in operating an ordinary sewing-machine; I couldn't answer that. She is a frail person and I doubt it, I really have my doubts if she could run a sewing-machine all day with one foot. I wouldn't like a patient of mine to use her foot that way, not unless I was there. I would allow a patient of mine to walk on the foot that has been injured that way after a year. As a matter of fact in the ordinary case of an adult of that age they are invariably out and walking around, after sustaining a Potts fracture, within all the way from three to six weeks. As I stated, they would have to use it very little, to try it out easily, and it would cause some discomfort and also some annoyance and in the following of a livelihood. It is generally recognized among medical men that a reasonable amount of use of a limb which has sustained an injury of that kind is very beneficial, but the point of it is here, how can you regulate it if you allow a patient to promiscuously use her limb, you cannot regulate the patient and she doesn't know how much to manipulate it and that is why I stated that massage and proper treatment would help, under a good competent man. I haven't seen her since the accident, that is to examine it. It is possible that the stiffness might last for three years. [53]

Q. Well, assuming that the stiffness disappears at the end of three years, what, if any, injury would there remain?

A. Taking an injury to any member of the body it places that part more liable to disease, such as rheu-

(Deposition of Eliphalet T. Pattee.)

matism, and that is one thing that I told her that she must guard against, as she is—I don't know her age, but I think she was about forty, around in there, and a woman of her age would have to watch out for that. It would be entirely problematical as to whether she would ever suffer from rheumatism.

Q. At the end of three years, assuming that the stiffness entirely disappears would any injury still remain from which she would suffer?

A. I hardly know how to answer that, because that is so problematical. I would judge that the bone itself for all practical purposes would be as good as ever. The only defect that would be noticeable to her or to others would be the weakness, I would say the weakened condition of the member. I mean to say that after three years there is a probability of this woman finding that her limb is noticeably weaker than it was before the accident, from a practical standpoint. I couldn't state how long that condition would remain, I couldn't tell. I think it would be very probable. I mean to say that in the ordinary case of a fractured limb, it would be weaker than the other; weaker than it was before, very probably, for a period of five or six years after the accident. You must remember that different people have different recuperating powers. I would state in her case that it would be very probable for her to have more or less trouble with that condition over a period of four or five years, but after that, for all practical purposes, she would have complete use of it. She complained of some trouble in her back, and

(Deposition of Eliphalet T. Pattee.)

I simply told her to use some hot packs. I did not examine her back at any time. She did not ask me to examine her back. I thought it was a strain and by rest and [54] care it would adjust itself. This woman went on crutches for a while by my advice. She left Pullman at that time, after her limb got better, so she could travel, and went out to her cousin's and I did not see her over a period of ten days, but as far as I know I would say that she followed my instructions about staying on crutches as long as I wanted her to.

Q. Isn't it a fact that she actually discarded her crutches before you thought it was proper, and you told her she would have to follow your advice about the use of crutches if she was going to continue as your patient?

A. I remember having some talk with her about it. She came to town and I met her down in from of the office—she came in to town in a carriage and she said, "Oh," she says, "my ankle is giving me fits," and I said—I asked her if she had been following my advice. That was after the cast had been removed, and only the posterior splint on it and she said that she had, and I said, "What are you doing in town to-day?" and she says, "Well, I drove in in the carriage," and she had her shoe on and it wasn't laced, and I said, "Is your foot swelling?" and she said it was. I asked her at that time if she had been using the crutches, that afternoon I mean, and she said that she had been using one of them. And I said that, "I think you had better not go too fast about

(Deposition of Eliphalet T. Pattee.)

using your foot, and keep you foot elevated, since we have taken the cast off," and she said that she would.

Q. Well, isn't it a fact that she did discard either both or one of the crutches before you as her physician told her it was proper to do so?

A. That was the only occasion that I had to talk to her about it, and I hardly know how to answer that question. I would say that with my patients I always try to have them take the best of care and the best of precaution that no accident happens, because with an ankle in that condition she might have slipped again, which [55] frequently happens many times. I would not say that she had violated my instructions in discarding one or both of those crutches at that time. I am acquainted with Mr. Dow, the city attorney. I do not remember a talk I had with him shortly after the suit was started about the accident, telling him of the nature of the injury. I remember having a talk with him, but I don't remember the substance of the statement.

Q. Do you recall in that talk of telling Mr. Dow that your patient had violated your instructions in laying aside her crutches too soon?

A. I don't think I made the statement that strong.

Q. And you told her she would have to follow your instructions if she was to continue as your patient. Do you remember making any such statement?

A. No, I did not make the statement that strong. I made it just as I stated it to you in that talk on that Saturday afternoon I met her on the street and

(Deposition of Eliphalet T. Pattee.)

she complained of her ankle swelling. It was my opinion that she was going without her crutches as a safeguard and a precaution when she should have used them.

Redirect Examination.

On redirect examination by Mr. Salisbury, the witness further testified:

That fracture was what I would term an ordinary Potts fracture.

Q. Was there, in your opinion, any unusually aggravating features to it and injury there to the internal ligaments?

Mr. GILBERT.—I object to it as not proper redirect examination.

The COURT.—I think the objection is well taken. You may read the answer.

A. You cannot have a Potts fracture without having some [56] injury to the joint and to the tendons or ligaments. There may or may not be two breaks in an injury or fracture of that kind. Two breaks would make the case more complicated. After some three to five years the injury should become permanently healed and in good condition. There might be in this particular instance, with reference to this particular patient, a state of weakness in that injured limb, but as far as the direct injury is concerned that would be totally healed. I refer to the injury to the bone, but it would leave a weakened condition. And the probabilities are that with a woman of her age that that condition would remain with her more or less. I could not say what

(Depostion of Eliphalet T. Pattee.)

date it was that I referred to of Mrs. Branham having gone out to the country and returned in a carriage. You see we had taken the circular cast off and I would say between two and three weeks after the accident. I attended her constantly during that time. I would not say whether or not she committed any act which would add to her injury. As far as I know she did not. While she might have discarded one crutch, if she did not injure herself because of that, it would be immaterial, only as taking a slight risk. And if that did not happen, it was all right of course. As far as I know that did not happen.

Testimony of Dr. C. Hale Kimble, for Plaintiff.

Thereupon Dr. C. HALE KIMBLE was called and sworn as a witness in behalf of the plaintiff, and examined by Mr. Plummer, testified as follows:

The class of work I am carrying on in the city here and have been for a number of years, from a medical standpoint, is drugless treatments, all of the modern, legitimate methods of drugless treatments, mechanical therapy and electric therapy and hydrotherapy, so all of the so-called drugless sciences.

Q. Does your work and experience enable you to treat professionally people who are injured by strains and sprains of [57] the back, ligaments of the back?

A. Yes, really and truly that nature of injury falls particularly within our practice. I have been doing that work eighteen years, twelve years in Spokane;

(Testimony of Dr. C. Hale Kimble.)

I know the plaintiff in this case, Mrs. Branham. She came to me in January, I think it was, on the 29th, 1917, and I treated her continuously, daily treatments, from then through until May 31, 1917, for a spinal injury. I did not put her through an X-ray examination. I treated the conditions which I found, which were acute inflammation and congestion with some lateral sublaxation, that is a little displacement of the spine due largely to shock and injury. An X-ray would only show an osseous displacement. It would not show an injury to the muscles, tendons or other parts which are not of bony substance. Therefore an X-ray would be absolutely useless for those purposes, but you can tell about those conditions existing from your treatment of her. If this accident happened in 1916 it was nearly a year after this accident that I found this condition. I treated her continuously from January through until May. As far as I was able to judge the conditions had largely been ameliorated when she left; the congestion had been reduced and the inflammation had been reduced, but still there was some effect of the injury that was so deep seated it was impossible to get at it, and that remained, of course, with her when she left me.

Cross-examination.

Whereupon upon cross-examination by Mr. Hamblen, the witness further testified:

There was a slight lateral or slight rotary and lateral sublaxation, which was due apparently to a wrench and also to a contraction of the muscles

(Testimony of Dr. C. Hale Kimble.)

which comes from an inflammation of the motor nerves of the spine. I discovered that immediately upon the examination when she came in, on the 29th day of January. When I finished treating her, as far as I was able to judge, there was a [58] replacement, a reduction, you might say, of the laxations and also of the tortion. By laxation I mean a lateral side displacement of the vertebrae. It does not have to be very marked, it can be very slight. And by tortion displacement I mean a turning of the spine. Yes, that would be apparent from an X-ray examination, yet at the same time there are anomalies of the normal spine, certain anomalies. No two spines are diagrammatically the same. And at the same time a misplacement of that kind might be considered to be a perfectly normal condition, just the same as a malalignment of the spinus processes might be considered as perfectly normal. The condition that I found in her spine might be considered by persons who have not had the training to discover those things as a perfectly normal condition, but if it was normal there would not have been any inflammation. The fact of its being an abnormal condition was shown in the congestion, in the inflammation and the impingement on the spinal nerves. If it had been normal it would not have had any of that condition. When I was through with her, as far as I was able to judge, we had carried her as far as those methods would carry her. I did not touch her ankle, because I did not have the supervision of that, and I did not do anything

(Testimony of Dr. C. Hale Kimble.)

with it at all. I understood that was under the care of another physician.

Whereupon the plaintiff rested and the following proceedings were had:

Defendants moved the Court for judgment on the ground that plaintiff had failed to make out a cause of action, which motion was overruled and excepted to by the defendants.

Whereupon counsel for the defendants introduced the following testimony.

DEFENDANTS' TESTIMONY.

Testimony of Dr. Carl H. Wiseman, for Defendants.

Dr. CARL H. WISEMAN, a witness produced by the defendants, being first duly sworn, examined by Mr. Hamblen, testified as [59] follows:

My profession is that of physician and surgeon. Since coming into court this afternoon I have examined Mrs. Branham's ankle where the fracture occurred. I found a little roughness on the outside bone of the lower leg about an inch and a half above the ankle joint, which was in all probability the location of the break, a little irregularity there in the bone. That is the point where the bone is usually broken in a Potts fracture, where this bone is broken. The inside bone, I could not find anything that indicated that there had been any fracture. It might be possible that there had been, but there is no evidence of it at the present time. All the movements of the ankle joint are free and easy. In my opinion there has been a good union, the bone

(Testimony of Dr. Carl H. Wiseman.)

has united perfectly. There is no permanent injury as a result of it. With reference to a break of that kind, if it heals as this has healed, at about from six months to one year following the break the leg is just as strong as it ever was. I did not find anything which would indicate a permanent injury. It was rather hard to find any evidence at all. It was just a slight enlargement over that one point. An ordinary observer probably would not even discover that.

Cross-examination.

Whereupon, upon cross-examination by Mr. Plummer, he further testified:

I would not say that those bones might not have been broken. I say I could not find any evidence of any break in the other bone, and a very slight evidence in this one.

Q. In an inquiry of that kind, Doctor, assuming, now, that both bones were broken in an injury of that kind, it would injure more or less, would it not, the ligaments, muscles and tendons of that particular part of the limb?

A. No, that is just the thing that prevents any injury to the ligaments. The bone gives way and breaks. The way that prevents [60] injury to the ligaments is the break of the bone relieves the strain on the ligaments. Just as you would have a sprained ankle or dislocated joint. That is exactly what breaks this bone here is the tension on the ligaments there, throwing the foot in this position (indicating). Unless the bone gives way you will have

(Testimony of Dr. Carl H. Wiseman.)

a sprained ankle which means a—these ligaments run up and down. These are tendons (indicating). Yes, the ankle has some of those.

Q. Now, whenever you break this off doesn't it stretch this side of the ligaments or tendons or anything of that kind, or expand them or stretch them?

A. The bone might tear loose from the ligaments.

Q. Well, if it does not go to that extent of tearing loose, won't it extend those out and shorten the others, the giving way of the bone? A. No.

Mr. HAMBLEN.—We haven't the original contract here, but I have a copy here, and Mr. Plummer said he would make no objection.

Mr. PLUMMER.—I said I would make no objection to it being a copy, but I have not seen the contract yet.

Mr. HAMBLEN.—I wish to offer this contract.

Mr. PLUMMER.—I object to it on the ground it is incompetent, irrelevant and immaterial and does not tend to disprove any of the allegations of the complaint. What they agreed to do and what they did do are two different things.

Mr. HAMBLEN.—I will state that the original was not signed by the Northern Pacific.

The COURT.—You may proceed with the testimony and I will read this.

Testimony of Mrs. Matilda F. Gannon, for Defendants.

Mrs. MATILDA F. GANNON, called as a witness in behalf of the defendants, being first duly sworn, examined by Mr. Hamblen, **[61]** testified as follows:

I am city clerk of the city of Pullman; have lived in Pullman twenty-five years. Have been city clerk there five years; was city clerk on the 3d day of March, 1916. This instrument that you hand me, and this is identified as Defendants' Exhibit 2 for identification, was filed with me on the 3d day of March, 1916, filed with me as clerk of the city of Pullman.

(Whereupon said paper was offered and admitted in evidence without objection and marked Defendant's Exhibit 2.)

Testimony of D. C. Dow, for Defendants.

D. C. DOW, called as a witness in behalf of the defendants, being first duly sworn, and examined by Mr. Hamblen, testified as follows:

My profession is lawyer. I am the city attorney of Pullman at the present time, and have been such since January, 1917, I am familiar with this case and was connected with it officially when the city was a party. During the 3d, 4th and 5th of July, 1917, there was a soldiers' reunion, and a Fourth of July celebration at Pullman. The rink adjoins the park where the celebration was held. And on the evening of the 5th there was a dance conducted at the

(Testimony of D. C. Dow.)

skating rink. After the exercises at the park I dropped in to watch them dance, and Mrs. Branham was there and I saw her dance. The official connection that I had with the program that night was that I presided at the exercises at the park. This was on the 5th of July, 1917. Mrs. Branham danced with several people. I happen—how I happened to observe that, this case had been started some time prior to that time, and the city was still a party in the case at that time. The case had not been dismissed as to the city yet, and I saw her dancing. I took particular note of the fact that she was there and that she was dancing, and some of the parties that she danced with. I presume I was there an hour altogether. She **[62]** danced several times, I know of two parties. I have the names of two parties that she danced with, and there were two or three other dances that she danced during the time that I was there. She was dancing. There was a big crowd there and it was a real dance with plenty of music. I could not observe, while she was dancing, from the way she danced, that she was handicapped at all by reason of this. I had not danced for years.

Cross-examination.

Whereupon, upon cross-examination by Mr. Plummer, he further testified:

I just dropped in to this dance to see them dancing. I didn't know she was there until I got there. I stayed about an hour. That was a little more than

(Testimony of D. C. Dow.)

a drop in. There was a big crowd there and I saw her dancing several times.

Q. Since we let the city out of this thing, you have gone to the other side and told them all you could and showed some interest against Mrs. Branham?

A. Not particularly. I have been asked by the attorney for the railroad company—we were both defendants in the suit, and we went over the whole thing.

The COURT.—I will admit this contract for the purpose of showing the relation of the different parties to it.

(Whereupon the contract was admitted in evidence and marked Defendants' Exhibit 5.)

Testimony of Dr. M. F. Setters, for Plaintiff.

Dr. M. F. SETTERS, called as a witness out of order for the plaintiff, being first duly sworn, and examined by Mr. Plummer, testified as follows:

I am a practicing physician and surgeon of this city and have been for twenty years. I know the plaintiff in this case, Mrs. Branham; treated her and examined her ankle professionally. **[63]** some time ago, the first one the 4th of February, 1917. She had received a Potts fracture, which was broken, one broken bone, and a chip off of the other bone, leaving a weakened ankle, and she was then in a neurasthenic condition, which means a general nervous breakdown, which was very marked at that time, very decidedly. Assuming that there had been a Potts fracture there and both bones broken and

(Testimony of Dr. M. F. Setters.)

the doctor had obtained the result which I found there from my examination, considering that she was forty-one years old when it happened and considering the recuperative powers of a woman of that age as compared with others, a break of that kind usually involves the joint, and usually leaves a stiffness of the joint through life. Assuming there was an injury to the ligaments or muscles, in a woman of that age there would be undoubtedly a stiffness in the joint and she would never get the same flexibility. I don't think it would ever be repaired as it was before the break. She could walk and hop around and dance. I examined her back at that time. There is objective and subjective symptoms on all these patients. The subjective is what they tell me, the objective is what you see. The subjective symptoms were that she had a good deal of pain. In the examination of the back there was very little found except there was an increased irritability over the spine and also of the nerves below the spine. She had traumatic neurasthenia. In a woman of her age and of her circumstances this neurasthenic condition lasts from one to five years. A neurasthenic case is not able to earn any money, because their whole concentration of mind is on themselves. I have forgotten the percentage of neurasthenic conditions becoming chronic in a woman of her age, but the theory is usually about one in three, about thirty-three and one-third per cent.

(Testimony of Dr. M. F. Setters.)

Cross-examination.

On cross-examination by Mr. Hamblen, he further testified:

In the examination of the back there were no objective [64] symptoms except a little irritability. That irritability was not suggestive, you could get that by the reflexes, by the contraction of the muscles when you tapped them on the back; you can get that objectively. I have not examined her since that time and have not examined her prior to that time. That is the only time I ever saw her. The bones have united, leaving a stiff joint at that time. I did not treat her. I have forgotten who sent her over to my office for an examination. It was for the purpose of a report on her condition. I am not positive whether it was Mr. Salisbury that requested it.

Testimony of E. D. McDonald, for Defendants.

E. D. McDONALD, called as a witness in behalf of the defendants, being first duly sworn and examined by Mr. Hamblen, testified as follows:

I am claim agent of the O.–W. R. & N. and have been in the claim department for about nine years. As claim agent I investigate claims that are made against the company where accidents have happened. I first learned of this accident to Mrs. Branham about October 10, 1916. After that time I called upon Mrs. Branham, got a statement from her direct relative to the accident. That was on October 19th, 1916, at the Ridpath Hotel, in Spokane. At that time she was living at the Ridpath. I reduced the

(Testimony of E. D. McDonald.)

statement which she made at that time to writing, and had her sign it. I read it to her as I sat beside her. I talked with the lady and ascertained from her just how it occurred, and then I wrote it down, and read it over to her, and she sat beside me so she could see me while I was writing, and she signed the statement. This instrument marked Defendants' Exhibit 3 for identification is the statement which was made at that time and which was read to her and signed by her. There was no change of any kind made in that after she signed it.

(Thereupon the statement was offered [65] in evidence, marked Defendants' Exhibit 3, and admitted without objection.)

Cross-examination.

Thereupon, upon cross-examination by Mr. Plummer, the witness further testified:

My part of the work as claim agent for this company in case of any litigation that might be set or pending is to get the facts as to all of these accidents. It is not altogether my duty to look up evidence; partly to get witnesses and help prepare the defense. I get these statements so as to get the facts as to how the accident happened. I did not get all my facts before I talked with her. At the time I got this statement it was in the lobby of the hotel, and there were a number of people around there. There was nobody immediately present that could hear what I said and what she said. I wrote this in the lobby on my knee. I wrote these two pages on my knee. It

(Testimony of E. D. McDonald.)

was just as handy to write them on my knee as to go to a table.

Q. Why didn't you ask her to write out something in her own handwriting as to how the thing happened?

Mr. HAMBLEN.—I object to that as immaterial.

Mr. PLUMMER.—Oh, to show his interest in the thing.

A. It was not necessary, because I could write it out for her.

Redirect Examination.

Thereupon, upon redirect examination by Mr. Hamblen, the witness further testified:

I took the original of this picture that you hand me; this is an enlargement of it. This shows a portion of the situation there after the bridge was completed, that is, from the O.–W. looking north and takes in just a part of Miller's restaurant here, shows the sidewalk of the bridge from the O.–W. up to the Northern Pacific. This was taken about the 18th of October, 1916, after the [66] work was completed and after the snow was off. I took this looking opposite direction from the N. P. right of way.

(Whereupon said photograph was admitted in evidence without objection and marked Defendants' Exhibits 6 and 7.)

Testimony of C. M. Hooper, for Defendants.

C. M. HOOPER, called as a witness in behalf of the defendants, being first duly sworn, and examined by Mr. Hamblen, testified as follows:

(Testimony of C. M. Hooper.)

I live at Pullman; been living there about nineteen years and seven years I have been working for the city as superintendent of the water department and also street commissioner. I am at the present time street commissioner. I was familiar with the situation there at the bridge in Pullman along in February, 1916. I remember of an accident there, but I did not know at the time who fell until the next morning. My office is about, I judge, 150 or 200 feet from the place where the accident was, and the O. R. & N. company was putting a top on a bridge there, and there was an opening I judge of five or six feet wide on the east side of the north approach to the bridge that never had been filled in, and the sidewalk covered it when the sidewalk was there, but the sidewalk had been taken out by the bridge crew, that is the railroad crew, and they had laid some three by twelve lengths parallelling where the old sidewalk used to be in the place of the sidewalk, and the pedestrians were travelling on the left hand side of that, and at the end of this bridge plank over there there was three more planks laying across to catch the bridge, so the pedestrians could use that to cross. Indicating on exhibit 1, my office was right about that point right there, which I will mark "office." I was coming out of my office at the time it happened, and I saw a man coming along there pretty rapidly, and he evidently saw the lady fall. It was Mr. Price. I did not see the [67] lady fall, because I was standing over there, and I think this bridge is, it is a high iron bridge, and I don't know but what it

(Testimony of C. M. Hooper.)

would bar my sight from seeing across to that direction where she was. Whether it would or not, I don't know, but I did not see it, anyway. When I saw him come across I started to see what was the matter with him, and he was helping the lady up here, and they were right about at this point here when I seen them. They were coming this way, that is going north. I came across on this side over here to the depot. The depot is up in here somewhere, I did not know who she was at that time. I don't know that I observed anything about her wearing apparel any more than that she had high-heeled shoes on, about that high (indicating), about two inches I guess they must have been. I happened to see those just as naturally, anybody would notice them and I thought at the time that she fell about it being peculiar. At the north end of the bridge there was a barrier there. The barrier was across this bridge. There was a post up here right at the corner of this bridge, and they were putting wood blocks all over the top of this. Right where you mark "post" there was a post there and a barrier all across there; a post across here six or eight feet, I should say. That is at Miller's restaurant. And there was a one by six plank up there, and that end was resting up there. By this end I mean the center of the bridge. That is the way the condition was. That completely blocked the walk away from the bridge, they would have to step over the plank to get across there; but that plank had been laid down in some way, it had been—it was down that night. If Mrs. Branham

(Testimony of C. M. Hooper.)

fell within two or three feet of where the barrier was, she would have to step over the barrier there, either do that or move it. There were planks all along in there parallel to the sidewalk there. They were there for the bridge crew to work on. I know that because I seen them working there and I know their material. Nearly all of it lay off in here (indicating). The [68] route taken by pedestrians as they cross that bridge was to go clear outside of those planks, to the east, between that and the restaurant. There is a porch of about six feet that comes out from the restaurant like that, and the pedestrians went between this plank and that porch. To go back on to the sidewalk on the bridge there were some planks laying this way, bridge planks, three by twelve, running across the end of the bridge and across this hole. There was a big banister here, right across from here, and that taps on to the bridge rail. I don't know anything about how the sidewalk was, whether the sidewalk on the bridge had been completed clear to the north line or not; I could not say as to that. I don't know. I did not make any investigation of that after the accident happened. As near as I can tell Defendants' Exhibit 7 is just the identical representation of the bridge and the walk as it is now in *from* of the Miller place and extending along there in a southerly direction. The barricade would come to this point right here, and where pedestrians went was dirt here. The people would have to walk there to get over there, because these plank lay right in there, like this cut shows

(Testimony of C. M. Hooper.)

here, the bridge plank lay in here, and this hole extended out here a foot or two past that, and it was built afterwards. That barricade came away out to about there, and the other post was out about there (indicating); that is on the curb of the roadway.

Cross-examination.

Whereupon, upon cross-examination by Mr. Plummer, the witness further testified:

There was a banister ran out from the restaurant that ran out and tapped on to the rail along the sidewalk on the bridge; it shows it right in that cut there. A person coming from the direction in which this lady was coming there, in order to get on to that bridge would not have to walk on to this plank; she could get on to the plank on the side next to town. I say there was a banister [69] running from this restaurant that ran over to this rail, and this rail ran along here. All of this part is shut out by this rail. If a person is coming down here and wants to get across that bridge, they can get over here by walking along her, right along the bridge there. That rail extended about there, as far as that cut shows it. They could walk anywhere along here; if this rail was not there they could walk along here. Here is where people did walk. There were three bridge planks here that were there for the bridge crew. They were blocked up there, they were blocked at this end; there was a barrier there all the time. There was one there at night, except when this was down there at night and the accident happened. I mean to say that in front of this plank there was a

(Testimony of C. M. Hooper.)

barrier, north of the sidewalk. There was nothing on that side at all. This barrier extended out past those planks, but I don't know how far past those planks, over this way. There was three posts, to my knowing; there was a post up here and a post at that corner, and a post over there, and I think there was one in the center. It wasn't their intention that everybody who used that street should jump over that plank. The plank lay across from that bridge over to here, for them to go on. The bridge crew laid the planks there. The plank that the people were supposed to walk on were laid there by the bridge crew so that people could get onto this bridge from this street across to here. As a matter of fact there was a path all the way along there. The bridge crew worked on that all the time. The bridge crew had laid off then on account of orders. I could not say whether they laid off on account of the weather. I could not say whether this was about six o'clock; it was not dark yet. I don't know what time it was, it was not dark. I saw the man walking along because he passed perhaps as far as from here to that wall in front of my door. I saw him just as I would see you walking along there, and he was walking pretty fast. I did not see the lady fall. I did not see the lady that had fallen on the [70] plank. He had gotten there and had helped her up when I seen her. He had her by the arm. They were not walking along; they were standing still at the time I saw them. I was the length of this room perhaps away from them when I saw them. I did not go

(Testimony of C. M. Hooper.)

towards them after I saw them up; I went to the depot. I was going to the depot; I was on my way to the depot and I went to the depot on the opposite side of the bridge from these people. I was thirty or thirty-five feet away from her when I saw her standing up with Mr. Price, something like that. They stood still while I was looking at them just a few minutes, because I did not pay any attention to them. He helped her up. I didn't suppose anybody was hurt at all. I don't know whether they walked off or not after he lifted her up. They were there where I seen them, they were standing up there. I could not say how long they stood there, because I was going across to my work and paid no attention to them. I saw these high-heeled shoes all of that time; all of that distance I saw those great big high-heeled shoes.

Q. All of the time while she was walking through the snow? A. Yes, sir.

Mr. HAMBLEN.—I want to read the deposition of Mr. Price.

Deposition of Charles A. Price, for Defendants.

Thereupon the deposition of CHARLES A. PRICE, a witness on behalf of the defendants, was read by Mr. Hamblen, as follows:

I live in Long Beach, Los Angeles County. In October, 1916, I lived in Pullman; had been living there at that time something like ten or eleven years; was engaged in the feed and grain business. At present I am retired. I am acquainted with Mrs. A. D. Branham, slightly acquainted with her. I

(Deposition of Charles A. Price.)

have known her for something like two years, I think; I guess it was about two years, at the time of this accident. I saw the accident in February, 1916, when Mrs. Branham fell and turned her ankle; saw it when it happened. [71] It was a somewhat cloudy day on which this accident occurred, and it occurred about five thirty or five forty-five P. M. The conditions as they existed right at that particular time and place were that the Oregon-Washington Railroad & Navigation Company were repairing a bridge across the Palouse River, and they had some workmen there repairing this bridgeway, which led from the business side of the town over across the river to the residence district where this lady, Mrs. Branham, and I and others lived, and we were in the habit of crossing this bridge to and from the business district. And when the railroad company came there to repair this bridge, they put up a sign there warning us people to stay off the bridgeway. As near as I can remember it that warning said to pass around over the left in coming to town—or to the right in going north, of a certain restaurant building, known as Miller's restaurant. This passageway which this sign told people to take was not exactly an easy way, you had to pass out around the restaurant and onto the railroad right of way, and come on back on this sidewalk that led over into the town—so it made it somewhat an inconvenient way to go around. But it was a perfectly safe way. But we people who lived over on that side would insist on going straight across there during the time that they were making

(Deposition of Charles A. Price.)

these repairs. But at this particular time, shortly before this lady was hurt, there came a snowstorm which delayed the work for the time being, when they had this bridgeway probably about two-third completed, over across the most dangerous part of the crossing, and along that part of the bridge the company had placed planks, about three by twelve lying lengthwise along there for their workmen's protection, and for the workmen to walk on. In addition to these signs warning the public to stay off the bridge, and to go around the restaurant, the railroad company had placed a bulwark at the north end of the bridgeway, to block the passageway, and to keep people from using the bridge while it was being [72] repaired. The unsafe condition of this bridge was open and obvious to anyone passing along there, so that anybody could see it; it was plainly in sight so that anybody could see it. As I said a moment ago, there had come a snow storm, and the snow had piled up there perhaps six inches or more deep, and the snow had piled up on these planks, and on the edges of the planks, where the workmen had been walking along there, the snow was thinner and it was coned up in the middle from three to four inches high, in the center of the plank. That could be seen by people who started to walk over that bridge, certainly. I and the druggist, Mr. Pinkley, were walking along there together, about 5:30 or maybe a quarter to six in the evening, and we were going right along this bridgeway, and I noticed this lady, Mrs. Branham, step along this walk there, and

(Deposition of Charles A. Price.)

step around this bulwark that had been placed there to keep people from using this bridge while it was undergoing repairs, and she stepped around this bulwark, coming from the north end and stepped on to these planks that I have described, that were lying lengthwise and as she stepped on the edge of the plank, she just went down—she did not fall, or anything like that, but just seemed to settle right down, just sat right down on the bridgeway. And Mr. Pinkley and I ran to her and got hold of her and asked her if she had been hurt, and she said that she did not know whether she was hurt or not, and Mr. Pinkley asked her if she thought that she would be able to walk, and she said she thought she could, and she walked away without assistance, although she limped as she went away. And as she walked away, I noticed particularly that she had on a pair of these very high-heeled shoes that the women wear. I noticed that she did not have on any rubbers and that she had on a pair of those extremely high-heeled shoes. I don't know anything at all about the extent of her injuries, or how bad she was hurt, or anything of that kind. There was nothing to hinder anyone approaching this bridgeway from seeing the conditions that confronted her [73] when she walked around this bulwark and started across that bridge; there was nothing to hinder her from seeing the conditions there, just as I have described them. And there was a safe passage around the other way, and the railroad company had put up a sign there warning the public to use this other way around. This

(Deposition of Charles A. Price.)

lady had come across a worse place than the place where she fell—further back the ground was slippery with ice, and where she fell there was just snow. The extremely high-heeled shoes caused her ankle to turn as she was walking along there.

Whereupon the defendants rested and the following proceedings were had:

PLAINTIFF'S REBUTTAL TESTIMONY.

Testimony of Mrs. A. D. Branham, in Her Own Behalf (in Rebuttal).

Mrs. A. D. BRANHAM, recalled as a witness in her own behalf in rebuttal, upon examination by Mr. Plummer, testified as follows:

Referring to this claim that was filed with the city a few days after the accident, at that time I did not know or appreciate the extent of my injuries, what they would be in the future, or what they had been since that time. Mr. Matthews got that up for me. At that time I was suffering from this injury that I speak of, and the back injuries. He brought that up and I signed it a few days after I was hurt. He didn't send it in until later.

Q. About these high-heeled shoes, I want to know all about those high-heeled shoes, Mrs. Branham. In the first place, let me ask you this, the question of work that you were doing, of dressmaking, state whether or not it required you to walk a great deal around town to places in doing your work?

A. Yes, sir.

Mr. HAMBLEN.—Objected to as incompetent,

(Testimony of Mrs. A. D. Branham.)

irrelevant and [74] immaterial.

Mr. PLUMMER.—I want to show that she had to walk a lot and had to use a walkable shoe.

Mr. HAMBLEN.—I don't think that is the proper question. I move to strike out the answer. It should not have been answered.

The COURT.—It is argumentative, I think.

A. They were a very ordinary walking shoe that I wore on that day, with a plain Cuban heel. The heel was not like this. A Cuban heel comes straight down, and it was a medium-sized heel. It was not a heel like this. The heel was not as high a heel and narrow a heel as this.

Q. Why do you wear that heel now?

A. Because I cannot wear a shoe.

Mr. HAMBLEN.—I object to that, if the Court please.

The COURT.—Sustained.

A. Because I cannot wear a shoe.

Mr. HAMBLEN.—Just a minute.

The WITNESS.—The heel that I had on that day, from the bottom of it up to here was not more than that high (indicating), not more than an inch and a half, and it came straight down, did not curve in like that; a plain Cuban heel, which comes with a high-heeled walking shoe. It was what is called a military heel. During that time and before the accident and at the time of the accident my daughter was with me in such a way that she would know what kind of shoes I wore.

(Testimony of Mrs. A. D. Branham.)

Cross-examination.

Whereupon upon cross-examination by Mr. Hamblen, she further testified:

There are different heights in those military heels that I speak of. In talking to Mr. McDonald one time after the time that this statement was made I do not remember any such statement as that these heels—that my heels were not over two inches high. I [75] did not discuss the high-heeled shoes that night with the gentleman that picked me up. I did not know after I talked with Mr. McDonald the claim would be made that my heels were high, and that would be one of the causes; I did not discuss those heels with anyone.

Testimony of Wilma Branham, for Plaintiff (in Rebuttal).

WILMA BRANHAM, being recalled as a witness in behalf of the plaintiff in rebuttal, being examined by Mr. Plummer, testified as follows:

I know the kind of shoes my mother wore at the time she was hurt; I know the kind she had on hand to wear. She did not have any kind of shoes at all, what they call a high-heeled shoe, or a shoe with a heel that high. The kind of heel or shoe that she wore when she got hurt, it was not a French heel, it was a Cuban heel, and it was not high, it was medium high; it was not a high heel. She did not have any French heeled shoes at all. I think that was the only pair of shoes she had. These are high-heeled shoes that I have on now; they are not mili-

(Testimony of Wilma Branham.)

tary heels. The kind of heels on my mother's shoes were Cuban heels; it is wider, more of a flat heel. These were real flat heels that my mother had on. They were maybe a little more than a half an inch, maybe three quarter, I don't know. I discussed the matter of heels with my mother at that time. It was not considered by me as a possible cause of the accident. We discussed the matter of heels at that time because it was stated that she had on high heels; that was a long time afterwards; that was the only way that we ever did discuss about the heels, was that she was accused of having high-heeled shoes, and I knew she did not, and she knew she did not.

Cross-examination.

Whereupon, upon cross-examination by Mr. Hamblen, she further testified:

Q. Just take this pencil and put your thumb there and [76] show about how high that heel was. Give the jury some idea.

The COURT.—I presume the jury knows what three-quarters of an inch is.

Mr. HAMBLEN.—She stated a little more than that.

A. Well, I don't know. I think it was just about like that. It was not much higher than that.

Mr. HAMBLEN.—Let us make a mark on that pencil and put it in evidence, where your thumb is. (Marking pencil.)

The WITNESS.—I don't know how wide it was

across the bottom of the heel. About that wide (indicating).

(Whereupon said pencil was admitted in evidence without objection, and marked Defendants' Exhibit 8.)

Whereupon the plaintiff rested, and the following proceedings were had:

Mr. HAMBLEN.—If your Honor please, I wish to renew my motion at this time, in view of the contract which has been shown here, in which the city expressly undertakes to protect the sidewalk during the period of construction. (Reading sec. 5 of the contract to the Court.) There is nothing shown that there is any violation of that paragraph, and the burden is on the city, according to the contract, to keep that street closed, and I therefore renew our motion and ask for a directed verdict.

The COURT.—Suppose they did not keep it closed?

Mr. HAMBLEN.—Then the burden is upon the city and not upon the company here, and if there is any negligence there, it is the negligence of the city and not the negligence of this company. It seems to me it is absolutely clear. The duty under the contract by which this company undertook to repair this bridge, the duty is upon the city to keep that bridge closed. The city did not keep it closed, or at least the people went upon it. That does not shift the burden upon the O.-W. R. & N. Company. The duty is still there upon the city, and it seems to me, as a matter of law, [77] that the defendant is not—

The COURT.—Unless this walk, or whatever it might have been, was constructed by the O.-W. R. & N. for the use of the travelling public, I would charge the jury as a matter of law that it owed no duty to the public in regard to its construction or maintenance. But if it was constructed there for the use of the public by the railway company, of course it was its duty to see that it was constructed properly or safely at least, and kept in a reasonably safe condition during the period of construction.

Mr. HAMBLEN.—But that does not relieve the city, if your Honor please, from keeping the bridge closed. The testimony shows that that was constructed for the use of the workmen for the company here.

The COURT.—Well, that will be a question for the jury.

Defendants excepted to the ruling of the Court, which exception was allowed by the Court.

THEREUPON, before the Court instructed the jury, the defendant requested the Court to give the following instructions:

INSTRUCTION No. 1.

I instruct you to return a verdict in this case in favor of the defendant.

INSTRUCTION No. 2.

The negligence of the defendant alleged in the complaint in order to entitle you to find for the plaintiff must be proved by preponderance of the evidence, and such proof must be confined to the negligence complained of. Hence, if you should find that the defendant was negligent in some respect

other than that charged in the complaint, or if you should find that the negligence which caused the injury to plaintiff was due to the action of some other agency, then I instruct you to return a verdict in favor of the defendant. [78]

INSTRUCTION No. 3.

From the mere fact that an accident happened and plaintiff was injured you are not to infer negligence on the part of the defendant, but the presumption is that the defendant was exercising due care at all times and the burden is upon the plaintiff to overcome this presumption by a preponderance of all of the evidence in the case.

INSTRUCTION No. 4.

I instruct you that the reconstruction and repair of the bridge along Kamiaken Street in the town of Pullman by the defendant, Oregon-Washington Railroad & Navigation Company, was undertaken by said defendant under and pursuant to a contract in writing entered into between the town of Pullman and the defendant, Oregon-Washington Railroad & Navigation Company, by the terms of which the said town of Pullman expressly agreed to keep the said street and bridge closed during the said period of repair and reconstruction. Therefore, if you find from the evidence that the town of Pullman failed to close the said bridge in accordance with the terms of the contract above referred to and permitted the same to be used by the public during the said period of repair and reconstruction and if you further find from the evidence that by reason of the failure of the said town of Pullman to so close

the said bridge that plaintiff entered upon the same and while on the same or a part thereof slipped and fell and was injured, then you are instructed that this defendant is not liable therefor and your verdict should be for the defendant.

INSTRUCTION No. 5.

I instruct you that it was not the duty of the defendant company to keep the sidewalks along Kamiaken Street bridge free and clear of snow and ice or either, and if you find from the evidence that at the time the alleged accident happened the sidewalk on which plaintiff was walking was covered with snow and ice and by [79] reason of such condition the plaintiff slipped and fell and was injured, then the defendant cannot be held for such injuries and I instruct you to return a verdict for the defendant.

INSTRUCTION No. 6.

I instruct you that if you find from a preponderance of the evidence that the defendant was negligent in any of the particulars alleged in the complaint, other than negligence in respect to snow and ice upon the walk, and you also find that the snow and ice had been allowed to accumulate on the sidewalk on said bridge over and along Kamiaken Street, and you further find that the accident to the plaintiff from which she sustained her injuries complained of was due as much to the slippery and unsafe condition of the sidewalk as to the condition created by the negligence of the company, if you find any such negligence, then I instruct you that

the defendant company is not liable to the plaintiff, and your verdict shall be for the defendant.

INSTRUCTION No. 7.

The Court instructs you that the plaintiff, Mrs. Branham, was required under the law to use ordinary care in passing over the sidewalks of the town of Pullman, and the walk on the bridge in question, and if you find from the evidence that the sidewalk of the town of Pullman in question, was defective and in a dangerous condition due to the negligence of the defendant at the time and place of the accident, you will next proceed to determine whether plaintiff at said time and place was exercising ordinary care.

By ordinary care is meant the care which an ordinarily prudent person would use in travelling over the sidewalks of the city, and if you find from the evidence that Mrs. Branham at the time and place of the accident was not using ordinary care in travelling over the said sidewalks of the city, as I have defined the meaning of the words, ordinary care, then you must find for the defendant, notwithstanding that you might believe from the [80] evidence that the defendant at the time and place of the accident was negligent in some particular complained of by the plaintiff; provided further you find from the evidence that the want of care of Mrs. Branham in travelling over the sidewalk at the time and place of the accident contributed proximately to her accident and the injury resulting therefrom.

INSTRUCTION No. 8.

I instruct you that if either the knowledge of the

condition of the sidewalk of the place upon which Mrs. Branham slipped and fell, or the fact that she was wearing at the time improper shoes with which to go upon a walk the condition of which she knew was the primary cause of the accident, she was guilty of contributory negligence and cannot recover and the verdict should be for the defendant.

INSTRUCTION No. 9.

I instruct you that when a person knows of a dangerous sidewalk, or a sidewalk in a dangerous condition, the law requires of her to exercise such reasonable care as the ordinarily prudent and cautious person would use under like circumstances. If this is done and injury results, the person is without fault and if you find this to be the case, then Mrs. Branham was not guilty of contributory negligence. If this were not done and the failure so to do proximately contributed to the injury sustained by Mrs. Branham, then she would be guilty of contributory negligence and could not recover.

The question of whether upon all facts in the case as disclosed by the evidence, Mrs. Branham was or was not guilty of contributory negligence, is one for your determination.

If from the evidence you find that she was guilty of contributory negligence and such negligence on her part was the proximate cause of the injury sustained by her, then you shall find for the defendant. [81]

INSTRUCTION No. 10.

If from the evidence introduced upon the trial, carefully considered by you in the light of the in-

structions given you by the Court, you determine that the plaintiff should recover, then you are to assess her damages, but in doing this you must have due regard to the rights of the defendant. Compensation in money is what the law proposes to give where liability is established.

INSTRUCTION No. 11.

I instruct you that the undisputed evidence in this case is to the effect that barriers were placed at the north end of the bridge and sidewalk extending clear across the same.

I further instruct you that the undisputed evidence is that in order to go upon the sidewalk on which plaintiff fell, she was required to pass around the end of the barrier so placed.

I further instruct you that if you find that in so doing she did not exercise ordinary care, as heretofore defined in these instructions, then you will find her guilty of contributory negligence and your verdict shall be for the defendant. The fact that other persons had travelled the street and taken the risk incident to going upon the walk in the condition in which it was, does not change the rule herein laid down. There are always persons who take risks if a short cut can be made and who will go upon a street even if it is obviously not open to public travel.

INSTRUCTION No. 12.

If under the instructions I have given you, you find that the plaintiff is entitled to recovery, then you will allow her such sum as will fairly compensate her for the pecuniary loss which she has suf-

fered by reason of the injury complained of, and in this connection you may take into account her age, habits of life, industry; the work and character of work performed by her prior to the accident, the work and character of work if any, which she has performed since the accident; the pain and suffering if any as a [82] result of the injury.

INSTRUCTION No. 13.

If under the charge of the Court you should find for the plaintiff, yet if under the evidence you believe that the plaintiff is able to work and earn money, it is her duty to do so and thereby lessen and avoid so far as she can do so the consequences resulting from the injury complained of, and it is your duty in assessing the damage to diminish the amount thereof to that extent.

INSTRUCTION No. 14.

In considering this case and in arriving at a verdict you will not allow yourselves to be influenced or controlled by any consideration of feelings or passion, prejudice or sympathy for or against either party to the cause, nor will you be influenced or controlled by the fact that the defendant is a corporation, but it is your duty and you are required under the law to decide the case the same as if the parties to the litigation were both natural persons.

It was stipulated between counsel that in event of the submission of the case to the jury and the return of a verdict against the defendant and in favor of the plaintiff, the defendant might interpose a motion for judgment notwithstanding the verdict, and no legal objection will be raised to the making

of such motion and its consideration by the Court.

Thereupon an adjournment was taken until 10:00 o'clock A. M., Monday, September 23, 1918, at which time arguments were made to the jury on behalf of the plaintiff and defendant.

Thereupon the Court instructed the jury as follows:

Gentlemen of the Jury: This is an action to recover damages for personal injury. The action is based upon negligence. [83] Negligence is defined as the doing of that which a reasonably careful, prudent and considerate man would not have done under like circumstances and conditions; or the failure to do that which a reasonably careful, prudent and considerate man would have done under the like circumstances and conditions.

There are two defendants mentioned in the complaint in this action. One is the city of Pullman and the other is the Oregon-Washington Railway & Navigation Company. The charge of negligence against the Railway Company is in substance that it constructed and maintained a dangerous walk on a certain street in the city of Pullman, while it was engaged in the construction of a bridge across that street under a contract with the city of Pullman.

You will distinguish, then, in this case, between the duty which was imposed upon the Railway Company here and the duty which was imposed upon the city itself.

It is the duty of a municipal corporation to see that all its streets are kept in reasonably safe condition for public travel; and if they are not in safe

condition it is its duty to erect proper barriers to keep the public from entering into the dangerous places.

A contractor with the city, however, is only liable for its own negligence. It is not liable for the general condition of the street unless that condition was produced or brought about by its own action.

If you find from the preponderance of the testimony in this case that the sidewalk where this injury occurred was constructed by the Oregon-Washington Railway & Navigation Company for the use of foot-passengers in the city of Pullman while the work was under construction; or, if you find that the city knew that the sidewalk would be used by the general public, then the duty rested upon the Railway Company to make the sidewalk reasonably [84] safe for that purpose. Whether it was reasonably safe, is for you to determine; and, in determining that fact, you must take into consideration the temporary character of the walk, the purpose for which it was constructed, and all the surrounding circumstances.

If you find that the railway company constructed it for the use of the public, or with knowledge of the fact that they would use it, and if you find that it was not reasonably safe for that purpose, the plaintiff is entitled to recover here unless she herself was guilty of contributory negligence.

In determining the question of contributory negligence you have the right to consider the barrier that was placed in the street, the kind of shoes the plaintiff wore and how she conducted herself and

all the surrounding circumstances.

If the city constructed a barrier there sufficient to warn the public against the use of the street and they persisted in using it, then neither the city nor the railway company is responsible for what might happen then, because they assumed all risks in going in a forbidden place. But, in determining that question, you have a right to consider whether or not the barrier constructed by the city, if any was constructed, to warn the public against the use of the street, and the mere fact that others may have used it, would not be conclusive upon that question. On the other hand, Gentlemen of the Jury, I charge you as a matter of law that the railway company was not responsible for the accumulation of ice and snow upon that walk and was under no obligation to remove it. And if you find that the existence of the snow and ice on the walk was the sole and only cause of the plaintiff's injury, then she cannot recover.

You, Gentlemen of the Jury, are the sole judges of the facts in this case and the credibility of the witnesses. Before reaching a verdict, you will carefully consider and compare all the testimony. You will observe the demeanor of the witnesses upon the [85] stand, their interests in the result of your verdict, if any such interest is shown; their knowledge of the facts in relation to which they have testified, their opportunity for seeing, hearing or knowing those facts, the probability of the truth of their testimony, their bias or prejudice, or the absence of either of these qualities, and all other facts and cir-

cumstances given in evidence or surrounding the witnesses at the trial.

A certain claim presented to the city of Pullman has been offered in evidence here; and you are only authorized to consider that claim in so far as it may tend to contradict the testimony of the plaintiff given upon the witness-stand. It has no bearing on the recovery and does not limit the amount of recovery. But if the statements contained in that statement are inconsistent with the testimony of the witness on the stand you have a right to consider that fact in weighing her testimony.

If you find for the plaintiff, it will be incumbent upon you to insert the amount of her recovery. You will compensate her for any loss which she has sustained through the impairment of her earning capacity in the past, although I believe that there is no testimony before you as to what her earning capacity was. These items will make up the amount of your verdict, in the event that you find for the plaintiff.

I think probably you understand the issues in the case now from what I have said to you. The first question in the case is: Was this walk constructed by the company for the use of foot-passengers or with knowledge of the fact that it would be used by foot-passengers? If it was, at the time of its original construction, was it reasonably safe for that purpose under all the circumstances? If you find both of these issues against the defendant then the plaintiff is entitled to recover unless she was guilty of contributory negligence.

The burden of proof is upon the plaintiff to make out the [86] negligence charged by a preponderance of the testimony; and the burden of proof is upon the defendant to make out the charge of contributory negligence.

It is necessary to say that if you find that this walk was constructed by the defendant for the use of its own employees only and was not intended for the use of the public and the railway company did not know that it was being so used, then it has violated no duty it owed to the plaintiff, and your verdict will be for the defendant.

I have already stated to the jury that if the injury was caused solely through the accumulation of ice and snow on the walk there is no liability on the part of the railway company because it was under no obligation to remove such obstruction.

You may now retire.

Mr. HAMBLEN.—Before the jury retires I desire to take exceptions to the instructions.

Mr. PLUMMER.—We have no exceptions.

Mr. HAMBLEN.—In order to make the record we will except to Instruction No. 1 which was refused.

We will except to the refusal of the Court to give Instruction No. 3 requested by the defendant.

We except to the refusal of the Court to give Instruction No. 4 requested by the defendant.

We except to the refusal of the Court to give Instruction No. 6 requested by the defendant.

We except to the refusal of the Court to give Instruction No. 7 requested by the defendant.

We except to the refusal of the Court to give Instruction No. 8 requested by the defendant.

We except to the refusal of the Court to give Intion No. 9 requested by the defendant. [87]

We except to the refusal of the Court to give Instruction No. 11 requested by the defendant.

We except to that instruction given by the Court in regard to the construction of the sidewalk by the defendant, Oregon-Washington Railroad & Navigation Company, for the reason that there is no evidence showing that the Oregon-Washington Railroad & Navigation Company constructed the sidewalk or the boards adjacent thereto referred to in the evidence.

The defendant excepts to the instruction of the Court in regard to the earning capacity of the plaintiff for the reason that there is no evidence of any kind offered to show what the earning capacity of the plaintiff was and there is nothing for them to claim any damages upon this question of the case.

Whereupon the jury retired to consider of their verdict. [88]

[Title of Court and Cause.]

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and assess the amount of her recovery at three thousand seven hundred and fifty dollars ($3,750).

(Signed) J. D. CASEY,
Foreman.

[Endorsements]: Verdict. Filed September 24, 1918. W. H. Hare, Clerk. **[89]**

[Title of Court and Cause.]

Judgment.

This cause having heretofore come on for trial before the Court and a jury, and the cause having been submitted to the jury by the Court, and thereafter said jury returned into court their verdict awarding the plaintiff the sum of thirty-seven hundred and fifty dollars ($3750);

Now, therefore, upon the verdict of said jury and the evidence and proceedings in said cause.

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, A. D. Branham, do have and recover of and from the defendant, Oregon-Washington Railroad & Navigation Company, a corporation, the sum of thirty-seven hundred and fifty dollars ($3750), and costs to be hereafter taxed.

Done in open court this 25th day of September, A. D. 1918.

(Signed) FRANK H. RUDKIN,
Judge **[90]**

[Title of Court and Cause.]

Motion for Judgment Notwithstanding Verdict of the Jury.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, by its attorneys, and pursuant to stipulation entered into between

counsel for the respective parties, with the consent of the Court, and prior to the giving of instructions to the jury by the Court, by which stipulation it was agreed that in event the Court deny the motion of the defendant for a directed verdict the defendant might renew questions raised by such motion and the Court finally pass upon them by motion for judgment notwithstanding the verdict, moves the Court for judgment in favor of the defendant in the above-entitled cause notwithstanding the verdict of the jury returned in said cause in favor of the plaintiff and against the defendant.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant. [91]

[Title of Court and Cause.]

Motion for New Trial.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, by its attorneys, and in event the motion of the defendant for judgment notwithstanding the verdict, is denied by the Court, moves the Court for a new trial herein for the reasons and upon the grounds, following:

1. Excessive damages appearing to have been given under influence of passion and prejudice.

2. Insufficiency of the evidence to justify the verdict of the jury and that it is against the law.

3. Error in law occurring at the trial and ex-

cepted to at the time by the defendant.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant. **[92]**

[Title of Court and Cause.]

Order Denying Motion for New Trial and Motion for Judgment Non Obstante Veredicto.

This cause coming on for hearing upon the defendant's motion for a new trial, and upon defendant's motion for judgment notwithstanding the verdict of the jury (the latter having been interposed according to stipulation entered into at the time of the submission of the said cause to the jury), and the Court being fully advised in the premises, and having considered said motions, and each of them, and the argument of counsel;

IT IS ORDERED that defendant's motion for a new trial, and the motion for judgment notwithstanding the verdict, be, and each of the same are hereby denied.

Done in open court this 18th day of November, 1918.

(Signed) FRANK H. RUDKIN,
Judge.

Exception taken by defendant and exception allowed by the Court. **[93]**

[Title of Court and Cause.]

Motion for Extension of Time in Which to File and Present Bill of Exceptions.

Comes now the defendant by its attorneys, A. C. Spencer and Hamblen & Gilbert, and moves the Court for an order herein extending the time within which defendant may file its bill of exceptions, for thirty (30) days from the date of filing the order denying motion for judgment notwithstanding the verdict, and motion for new trial.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant. [94]

[Title of Court and Cause.]

Order Extending Time in Which to File and Present Bill of Exceptions.

The motion of the defendant for additional time within which to present and file its bill of exceptions, coming on for hearing and the Court being fully advised in the matter,—

Now, therefore, IT IS ORDERED that the defendant have thirty (30) days from the filing of the order denying motion for new trial and motion for judgment notwithstanding the verdict, in which to file and present its bill of exceptions in the above cause.

To which plaintiff excepts and exception allowed.

Dated this 18th day of November, A. D. 1918.

(Signed) FRANK H. RUDKIN,
Judge.

Copy of within received, plaintiff objecting to service on ground not served in time as per order of court, or as provided by Rules of Court.

Dated December 16, 1918.

PLUMMER & LAVIN,
Attorneys for Plaintiff.

[Endorsements]: Bill of Exceptions. Lodged in the U. S. District Court for the Eastern District of Washington. December 16, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. Filed January 29, 1919. W. H. Hare, Clerk. **[95]**

[Title of Court and Cause.]

Order Settling Bill of Exceptions.

Now, on this 27th day of January, A. D. 1919, the above cause coming on for hearing on the application of the defendant to settle the bill of exceptions in said cause, and the defendant appearing by Messrs. Hamblen & Gilbert, its attorneys, and the plaintiff appearing by Mr. John Salisbury and Messrs. Plummer & Lavin, her attorneys, and it appearing to the court that the defendant's proposed bill of exceptions was duly served on the attorneys for the plaintiff within the time provided by the order of the Court, and that no amendments have been suggested by the plaintiff, and that the time for settling said bill of exceptions has not expired; and it further ap-

pearing to the Court that said bill of exceptions contains all of the material facts occurring on the trial of said cause, together with exceptions thereto, and all the material matters and things occurring upon the trial, except the exhibits offered and received in evidence, and which exhibits are hereby made a part of said bill of exceptions, the same being Exhibits No. 1, 2, 3, 4, 5, 6, 7 and 8, and the clerk of this court is hereby ordered and instructed to attach the same to said bill of exceptions;

THEREFORE, upon motion of Messrs. Hamblen & Gilbert, attorneys for defendant, it is hereby ordered that said proposed bill of exceptions be and the same is hereby settled as a true bill of exceptions in said cause, and that the same is hereby certified [96] accordingly by the undersigned, Judge of this Court, who presided at the trial of said cause; that it conforms to the truth, and that it is in proper form and that it is a full, true and correct bill of exceptions and the clerk of the court is hereby ordered to file the same as a record in said cause, and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Order Settling Bill of Exceptions. Filed January 29, 1919. W. H. Hare, Clerk. [97]

[Title of Court and Cause.]

Motion to Strike Pretended and So-called Proposed Bill of Exceptions.

Comes now the plaintiff above named, and moves the Court for an order striking from the records, files and proceedings herein defendant's so-called and pretended proposed bill of exceptions in this cause, for the reasons:

I.

That under the rules of this court, and of the District of Washington, defendant was required to present to the clerk of this court its proposed Bill of Exceptions within ten (10) days after the verdict of the jury in said cause, the said cause being tried by jury, and verdict having been rendered on September 24th, 1918, and that defendant did not present or file any proposed bill of exceptions in said cause, nor secure or attempt to secure any extension of time within which to present, serve or file any proposed bill of exceptions herein, until on, to wit, the 18th day of November, 1918, defendant petitioned this court for an order extending the time for a period of thirty (30) days within which to prepare, file and serve a proposed bill of exceptions herein, and that neither at the time of the presentation of said petition, nor at any other time, did defendant make any showing upon the merits, or give any reason why said proposed bill of exceptions had not been prepared, filed and served within the time required by the rule of court; that plaintiff at said time resisted said application for extension of time upon the

ground that the time [98] had already expired, and that the Court had no jurisdiction or power to grant said extension; and the Court granted said motion as petitioned for, but at said time said court observed that he did not believe that the order was of any force or value in view of the fact that the time had already expired, and plaintiff excepted to the order as entered, which exception was allowed by the Court; that defendant's proposed and so-called bill of exceptions was served upon plaintiff's attorneys on December 16th, 1918, and plaintiff contends that the Court had no power or authority to grant said extension of time when the time had already expired, or to make any order extending said time.

II.

That there is no legal, valid or proper bill of exceptions on the part of the defendant herein, prepared, served or filed in said court, as provided by the rules of this court.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

Service admitted this 23d day of December, 1918.
HAMBLEN & GILBERT,
Attorneys for Defendant.

[Endorsements]: Motion to Strike Proposed and So-called Bill of Exceptions. Filed in the U. S. District Court for the Eastern District of Washington, December 24, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [99]

[Title of Court and Cause.]

Petition for Order Allowing Writ of Error.

The defendant in the above-entitled cause feeling itself aggrieved by the rulings of the Court and the judgment entered on the 25th day of September, A. D. 1918, complains in the record and proceedings had in said cause and also to the rendition of the judgment in the above-entitled cause in said United States District Court, against said defendant on the 25th day of September, 1918; that manifest error hath happened to the great damage of said defendant, petitions said Court for an order allowing the said defendant to prosecute a writ of error in the Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of the security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings of this court be suspended and stayed until the said determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit; and your petitioner will ever pray.

Dated this 14th day of March, A. D. 1919.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant.

Service of the within petition is hereby acknowledged this 14th day of March, 1919.

PLUMMER & LAVIN,
Attorneys for Plaintiff.

[Endorsements]: Petition for Order Allowing Writ of Error. Filed March 21, 1919. W. H. Hare, Clerk. [100]

[Title of Court and Cause.]

Assignments of Error.

Comes now the defendant and files the following Assignments of Error upon which it will rely in the prosecution of the writ of error in the above-entitled cause, from the judgment made by this Honorable Court upon the 25th day of September, 1918, in the above-entitled cause:

I.

That the United States District Court in and for the Eastern District of Washington, Northern Division, erred in denying the motion of the defendant for a nonsuit immediately at the conclusion of the introduction of evidence by the plaintiff, for the following reasons:

1. That no cause of action has been proven against the defendant.

2. That defendant has not been shown to have been guilty of any negligence or breach of any duty towards the plaintiff.

3. That the accident which happened to the plaintiff was caused by the acts and negligence of the plaintiff herself, or by the negligence of some other person or party for which this defendant was not responsible, and not by reason of any negligence on the part of the defendant or any of its employees.

4. That under the contract with the City of Pull-

man, by which defendant had been performing certain work in connection with the reconstruction of the bridge referred to in the complaint of [101] the plaintiff, there was no duty, expressed or implied, on the part of the defendant in connection with the use of said bridge by the plaintiff, or the public of which the plaintiff was one, and that the defendant was not liable in case of any failure to perform any duty in connection with the maintenance of said bridge, if there was such failure of duty.

5. That the defendant was entitled to judgment of dismissal upon its motion.

II.

That the Court erred in denying defendant's motion for a directed verdict in favor of the defendant immediately at the close of all of the evidence, for the following reasons:

1. That no cause of action has been proven against the defendant.

2. That the defendant had not been shown to have been guilty of any breach of duty towards the plaintiff.

3. That the accident which happened to the plaintiff was caused by the acts and negligence of plaintiff herself and not by reason of any negligence on the part of the defendant.

4. That under the contract with the City of Pullman by which the defendant had been performing certain work in connection with the reconstruction of the bridge referred to in the complaint of the plaintiff there was no duty, expressed or implied, on

the part of the defendant in connection with the use of said bridge by which the plaintiff, or the public of which the plaintiff was one, and that defendant was not liable in case of any failure to perform any duty in connection with the maintenance of said bridge, if there was such failure of duty.

5. That the defendant was entitled to a verdict on the evidence, by the direction of the Court.

III.

That the Court erred in denying defendant's motion for [102] judgment notwithstanding the verdict (counsel for the respective parties having stipulated that such motion might be made and passed upon by the Court), upon the following grounds:

1. That the evidence did not show any negligence on the part of the defendant; that if the negligence of any party contributed in any way to the injury of plaintiff, it was not the defendant company, but was the City of Pullman or the contributory negligence of the plaintiff herself.

2. That the evidence showed that the plaintiff was guilty of contributory negligence which was the cause of the injury complained of.

IV.

That the Court erred in denying the defendant's motion for new trial on the following grounds:

1. Excessive damages appearing to have been given under the influence of passion and prejudice.

2. Insufficiency of the evidence to justify the verdit of the jury and that it was against the law.

3. Error in law occurring at the trial and ex-

cepted to by the defendant.

V.

That the Court erred in giving and refusing the instructions to the jury, in the following particulars:

1. The Court erred in refusing to give instruction No. 1, requested by the defendant, as follows:

"Instruction No. 1: I instruct you to return a verdict in this case in favor of the defendant," which refusal was excepted to before the jury retired, as follows: "We except to the refusal of the Court to give instruction No. 1 requested by the defendant."

2. The Court erred in refusing to give instruction No. 3 requested by the defendant, as follows: [103]

"Instruction No. 3. From the mere fact that an accident happened and plaintiff was injured you are not to infer negligence on the part of the defendant, but the presumption is that the defendant was exercising due care at all times and the burden is upon the plaintiff to overcome this presumption by a preponderance of all of the evidence in the case." To which counsel made the following exception: "We will except to the refusal of the Court to give instruction No. 3 requested by the defendant."

3. The Court erred in refusing to give instruction No. 4, requested by the defendant, as follows:

"Instruction No. 4. I instruct you that the reconstruction and repair of the bridge along Kamiakan Street in the town of Pullman by the defendant, Oregon-Washington Railroad & Navigation Company, was undertaken by said defendant under and pursuant to a contract in writing entered into between the Town of Pullman and the defendant,

Oregon-Washington Railroad & Navigation Company, by the terms of which the said Town of Pullman expressly agreed to keep the said street and bridge closed during the said period of repair and reconstruction. Therefore, if you find from the evidence that the town of Pullman failed to close the said bridge in accordance with the terms of the contract above referred to and permitted the same to be used by the public during the said period of repair and reconstruction and if you further find from the evidence that by reason of the failure of said town of Pullman to so close the said bridge that plaintiff entered upon the same and while on the same or a part thereof slipped and fell and was injured, then you are instructed that this defendant is not liable therefor and your verdict should be for the defendant."

To which counsel made the following exception: "We will except to the refusal of the Court to give instruction No. 4 requested by the defendant."

4. The Court erred in refusing to give instruction No. 6 [104] requested by the defendant, as follows:

"Instruction No. 6. I instruct you that if you find from a preponderance of the evidence that the defendant was negligent in any of the particulars alleged in the complaint, other than negligence in respect to snow and ice upon the walk, and you also find that the snow and ice had been allowed to accumulate on the sidewalks on said bridge over and along Kamiakan Street, and you further find that the accident to the plaintiff from which she sustained her injuries complained of was due as much to the

slippery and unsafe condition of the sidewalk as to the condition created by the negligence of the company, if you find any such negligence, then I instruct you that the defendant company is not liable to the plaintiff, and your verdict shall be for the defendant."

To which counsel made the following exception: "We will except to the refusal of the Court to give instruction No. 6, requested by the defendant."

5. The Court erred in refusing to give instruction No. 7, requested by the defendant, as follows:

"Instruction No. 7. The Court instructs you that the plaintiff, Mrs. Branham, was required under the law to use ordinary care in passing over the sidewalks of the town of Pullman, and the walk on the bridge in question, and if you find from the evidence that the sidewalk of the town of Pullman in question was defective and in a dangerous condition due to the negligence of the defendant at the time and place of the accident, you will next proceed to determine whether plaintiff at said time and place was exercising ordinary care.

"By ordinary care is meant the care which an ordinarily prudent person would use in travelling over the sidewalks of the city, and if you find from the evidence that Mrs. Branham at the time and place of the accident was not using ordinary care in travelling over the said sidewalks of the city, as I have defined [105] the meaning of the words, ordinary care, then you must find for the defendant, notwithstanding that you might believe from the evidence that the defendant at the time and place of the

accident was negligent in some particular complained of by the plaintiff; provided further you find from the evidence that the want of care of Mrs. Branham in travelling over the sidewalk at the time and place of the accident contributed proximately to her accident and the injury resulting therefrom."

To which counsel made the following exception: "We will except to the refusal of the Court to give instruction No. 7, requested by the defendant."

6. The Court erred in refusing to give instruction No. 8 requested by the defendant, as follows:

"Instruction No. 8. I instruct you that if either the knowledge of the condition of the sidewalk or the place upon which Mrs. Branham slipped and fell, or the fact that she was wearing at the time improper shoes with which to go upon a walk the condition of which she knew, was the primary cause of the accident, she was guilty of contributory negligence and cannot recover and the verdict should be for the defendant."

To which counsel made the following exception: "We will except to the refusal of the Court to give instruction No. 8, requested by the defendant."

7. The Court erred in refusing to give instruction No. 9, requested by the defendant, as follows:

"Instruction No. 9. I instruct you that when a person knows of a dangerous sidewalk, or a sidewalk in a dangerous condition, the law requires her to exercise such reasonable care as the ordinarily prudent and cautious person would use under like circumstances. If this is done and injury results, the person is without fault and if you find this to be the case,

then Mrs. Branham was not guilty of contributory negligence. If this were not done and the [106] failure so to do proximately contributed to the injury sustained by Mrs. Branham, then she would be guilty of contributory negligence and could not recover.

"The question of whether upon all facts in the case as disclosed by the evidence, Mrs. Branham was or was not guilty of contributory negligence, is one for your determination.

"If from the evidence you find that she was guilty of contributory negligence and such negligence on her part was the proximate cause of the injury sustained by her, then you shall find for the defendant."

To which counsel made the following exception: "We will except to the refusal of the Court to give instruction No. 9, requested by the defendant."

8. The Court erred in refusing to give instruction No. 11 requested by the defendant, as follows:

"Instruction No. 11. I instruct you that the undisputed evidence in this case is to the effect that barriers were placed at the north end of the bridge and sidewalk extending clear across the same.

"I further instruct you that the undisputed evidence is that in order to go upon the sidewalk on which plaintiff fell, she was required to pass around the end of the barrier so placed.

"I further instruct you that if you find that in so doing she did not exercise ordinary care, as heretofore defined in these instructions, then you will find her guilty of contributory negligence and your verdict shall be for the defendant. The fact that other

persons had travelled the street and taken the risk incident to going upon the walk in the condition in which it was, does not change the rule herein laid down. There are always persons who take risks if a short cut can be made and who will go upon a street even if it is obviously not open to public travel."

To which counsel made the following exception: "We will [107] except to the refusal of the Court to give instruction No. 11, requested by the defendant."

9. The Court erred in instructing the jury as follows:

"If you find from the preponderance of the testimony in this case that the sidewalk where this injury occurred was constructed by the Oregon-Washington Railroad & Navigation Company, for the use of foot-passengers in the city of Pullman while the work was under construction; or, if you find that the city knew that the sidewalk would be used by the general public, then the duty rested upon the Railway Company to make the sidewalk reasonably safe for that purpose. Whether it was reasonably safe, is for you to determine; and, in determining that fact, you must take into consideration the temporary character of the walk, the purpose for which it was constructed, and all the surrounding circumstances.

"If you find that the Railway Company constructed it for the use of the public, or with knowledge of the fact that they would use it, and if you find that it was not reasonably safe for that purpose, the plaintiff is entitled to recover here unless she

herself was guilty of contributory negligence."

To which the defendant excepted as follows: "We except to the instruction given by the Court in regard to the construction of the sidewalk by the defendant Oregon-Washington Railroad & Navigation Company, for the reason that there is no evidence showing that the Oregon-Washington Railroad & Navigation Company constructed the sidewalk or the portion adjacent thereto referred to in the evidence."

10. The Court erred in instructing the jury as follows:

"If you find for the plaintiff, it will be incumbent upon you to insert the amount of her recovery. You will compensate her for any loss which she has sustained through the impairment of her earning capacity in the past, although I believe that there is no [108] testimony before you as to what her earning capacity was. These items will make up the amount of your verdict, in the event that you will find for the plaintiff."

To which defendant excepted as follows: "The defendant excepts to the instruction of the Court in regard to the earning capacity of the plaintiff, for the reason that there is no evidence of any kind offered to show what the earning capacity of the plaintiff was and there is nothing for them to claim any damages upon this question of the case."

VI.

The Court erred in rendering and entering judgment in said action in favor of the plaintiff and against the defendant.

WHEREFORE, the said Oregon-Washington Railroad & Navigation Company, plaintiff in error, prays that the judgment of the District Court of the United States for the Eastern District of Washington, Northern Division, be reversed and that said District Court be directed to grant said defendant a new trial in said action.

(Signed) A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Plaintiff in Error (Defendant in Lower Court).

Service of the within Assignments of Error is hereby acknowledged this 14th day of March, 1919.

PLUMMER & LAVIN,
Attorneys for Plaintiff.

[Endorsements]: Assignments of Error. Filed March 21, 1919. W. H. Hare, Clerk. **[109]**

[Title of Court and Cause.]

Order Fixing Amount of Bond on Writ of Error.

The defendant, Oregon-Washington Railroad & Navigation Company, having this day filed its petition for a writ of error from the rulings, decisions and judgment made and entered in said action, to the United States Circuit Court of Appeals in and for the Ninth Circuit, together with the assignments of error within due time, and also praying that an order be made fixing the amount of security which it should give and furnish upon said writ of error and that upon the giving of said security, all fur-

ther proceedings in said court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Circuit; and said petition having been this day duly allowed:

Now, therefore, IT IS ORDERED, that upon the said defendant the Oregon-Washington Railroad & Navigation Company filing with the clerk of this court a good and sufficient bond in the sum of $5,000 to the effect that if the said Oregon-Washington Railroad & Navigation Company, plaintiff in error, shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by the Court, that all further proceedings in this court be and they are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals. **[110]**

Dated this 19th day of March, A. D. 1919.

(Signed) FRANK H. RUDKIN,
District Judge.

Service of the within order fixing amount of bond is hereby acknowledged this 21st day of March, 1919.

PLUMMER & LAVIN,
Attorneys for Plaintiff and Defendant in Error.

[Endorsements]: Order Fixing Amount of Bond on Writ of Error. Filed March 22, 1919. W. H. Hare, Clerk. **[111]**

[Title of Court and Cause.]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, the Oregon-Washington Railroad & Navigation Company, a corporation, as principal, and National Surety Company of New York, a corporation, as surety, are held and firmly bound unto A. D. Branham, in the full sum of $5,000, to be paid to the said A. D. Branham, for which payment, well and truly to be made, we bind ourselves and our and each of our successors and assigns firmly by these presents.

Sealed with our seals and dated this 19th day of March, A. D. 1919.

WHEREAS, lately at the September term of the year 1918, of the District Court of the United States for the Eastern District of Washington, Northern Division, in a suit pending in said court between A. D. Branham, plaintiff, and the Oregon-Washington Railroad & Navigation Company, a corporation, defendant, a final judgment was rendered against the said defendant, and the said defendant, Oregon-Washington Railroad & Navigation Company, having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said A. D. Branham is about to be issued, citing and admonishing her to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco thirty days from and after the filing of said citation;

Now, the condition of the above obligation is such that **[112]** if the said Oregon-Washington Railroad & Navigation Company shall prosecute its writ of error to effect and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

(Signed) OREGON-WASHINGTON RAILROAD & NAVIGATION CO.
By A. C. SPENCER,
HAMBLEN & GILBERT,
Its Attorneys.

[Corporate Seal]
NATIONAL SURETY COMPANY,
By JAMES A. BROWN,
Its Resident Vice-President.
Attest: F. S. JONES,
Its Resident Asst. Secretary.

The foregoing bond is approved as to form, amount and sufficiency of surety, this 19th day of March, A. D. 1919.

(Signed) FRANK H. RUDKIN,
Judge of the United States District Court, Eastern District of Washington.

Service of the within Bond is hereby acknowledged this 21st day of March, 1919.

PLUMMER & LAVIN,
Attorneys for Plaintiff and Defendant in Error.

[Endorsements]: Bond on Writ of Error. Filed March 22, 1919. W. H. Hare, Clerk. **[113]**

[Title of Court and Cause.]

Order Allowing Writ of Error.

Upon motion of A. C. Spencer and Hamblen & Gilbert, attorneys for the defendant, and upon filing a petition for writ of error and assignments of error:

IT IS ORDERED that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of the bond on said writ of error be and hereby is fixed at the sum of $5,000, which said bond may be executed by said defendant, as principal, by its attorneys herein, and by such surety or sureties as shall be approved by this court, and which shall operate as a supersedeas bond, and a stay of execution is hereby granted pending the determination of such writ of error.

Dated this 19th day of March, A. D. 1919.

(Signed) FRANK H. RUDKIN,
District Judge.

Service of the within order allowing writ of error is hereby acknowledged this 21st day of March, 1919.

PLUMMER & LAVIN,
Attorneys for Plaintiff and Defendant in Error.

[Endorsements]: Order Allowing Writ of Error. Filed March 21, 1919. W. H. Hare, Clerk. **[114]**

[Title of Court and Cause.]

Writ of Error.

The President of the United States of America, to the Honorable the Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court before you at the September, 1918, term thereof, between A. D. Branham, plaintiff, and the Oregon-Washington Railroad & Navigation Company, defendant, a manifest error hath happened to the said Oregon-Washington Railroad & Navigation Company, plaintiff in error, as by its complaint appears;

We being willing that error, if any hath been done, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid and all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 18th day of April next, in the said Circuit Court of Appeals, to be then and there held, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to

correct that error, what of right, and according to the laws and customs of the United States **[115]** should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 19th day of March, 1919, of the Independence of the United States the one hundred forty-fourth year.

[Seal] (Signed) W. H. HARE,
Clerk of the District Court of the United States for the Eastern District of Washington.

Allowed by

(Signed) FRANK H. RUDKIN,
District Judge.

Service of the within Writ of Error is hereby acknowledged this 21st day of March, 1919.

PLUMMER & LAVIN,
Attorneys for Plaintiff and Defendant in Error.

[Endorsements]: Writ of Error. **[116]**

[Title of Court and Cause.]

Citation on Writ of Error.

The President of the United States to A. D. Branham and to Messrs. Wm. H. Plummer, Joseph Lavin and John Salisbury, Her Attorneys, GREETING:

YOU ARE HEREBY CITED and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California,

within thirty days from date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein A. D. Branham is plaintiff and you are defendant in error, and the Oregon-Washington Railroad & Navigation Company is the defendant and is plaintiff in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 19th day of March, 1919, and the Independence of the United States, the one hundred forty-fourth year.

(Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington.

[Seal] Attest: (Signed) W. H. HARE,
Clerk. **[117]**

Service of the within Citation on Writ of Error is hereby acknowledged this 21st day of March, 1919.

PLUMMER & LAVIN,
Attorneys for Plaintiff and Defendant in Error.

[Endorsements]: Citation on Writ of Error. **[118]**

[Endorsed]: No. 3322. United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad and Navigation Company, a

Corporation, Plaintiff in Error, vs. A. D. Branham, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filed March 31, 1919.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

A. D. BRANHAM,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corp.,

Defendant.

Stipulation as to Printing of Record.

IT IS HEREBY STIPULATED, by the plaintiff in error by its attorneys, and by the defendant in error by her attorneys, that in printing the record in the above-entitled cause, the clerk shall cause the following to be printed for the consideration of the Court of Appeals:

Amended Complaint.
Answer to Amended Complaint.
Reply.
Verdict.

Defendant's Motion for Judgment Notwithstanding Verdict.
Defendant's Motion for New Trial.
Order Denying Motion for Judgment Notwithstanding Verdict.
Order Denying Motion for New Trial.
Judgment.
Bill of Exceptions and Order Settling.
Motion to Strike Pretended and So-called Bill of Exceptions.
Petition for Writ of Error.
Assignments of Errors.
Bond on Writ of Error.
Order Fixing and Allowing Bond.
Order Allowing Writ of Error.
Citation on Writ of Error.
Writ of Error.
Stipulation as to Making Up Record.

IT IS FURTHER STIPULATED, that in printing the said record, there may be omitted therefrom the title of the court and cause on all papers, excepting the first page, and that in lieu of said court and cause there be inserted in the place and stead thereof the following words, "Title of Court and Cause."

Dated this 22d day of March, A. D. 1919.

A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Plaintiff in Error and Defendant.

JOHN SALISBURY,
PLUMMER & LAVIN,
Attorneys for Defendant in Error and Plaintiff.

[Endorsed]: No. 2981. In the District Court of the United States for the Eastern District of Washington, Northern Division. A. D. Branham, Plaintiff, vs. O.-W. R. & N. Co., a Corp., Defendant. Stipulation. Filed March 24, 1919. W. H. Hare, Clerk. By ————, Deputy.

No. 3322. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 31, 1919. F. D. Monckton, Clerk.